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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 85

**CENTRAL STATES ELECTRIC COMPANY,
PETITIONER,**

VS.

**CITY OF MUSCATINE, IOWA, AND ELMER E. JOHN-
SON, FOR HIMSELF AND THE USERS OF NATU-
RAL GAS IN THE CITY OF GREENFIELD, IOWA,
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 13, 1944.

CERTIORARI GRANTED JUNE 12, 1944.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents.

Petition for Review of Order of the Federal Power Com-
mission

And, to-wit: On the twenty-third day of July, 1940, an order was entered by the Federal Power Commission, which said order was amended on August eighth, 1940. The said orders of July 28, 1940, and August 8, 1940, are set out as follows in the printed record filed on January 8, 1941, in the Circuit Court of Appeals for the Seventh Circuit:

[fols. 2-3] BEFORE FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott, Clyde L. Seavey.

* * (Caption G-109 & G-112) * *

ORDER REDUCING RATES—July 23, 1940

Having considered the complaint of the Illinois Commerce Commission against, the answer thereto by, and the order of this Commission instituting investigation of, the Natural Gas Pipeline Company of America and the Texoma Natural Gas Company, defendants-respondents herein, a motion of counsel for the Illinois Commerce Commission and counsel for this Commission for an immediate interim order reducing rates, the conditional answer and pleas to jurisdiction in reply thereto by defendants-respondents, the other orders previously entered herein, the evidence of record, the oral arguments presented before the Commission sitting en banc and the briefs filed herein, and having

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on this date made and entered its Memorandum Opinion [fol. 4] (Opinion No. 49) which is hereby referred to and made a part hereof by reference;

The Commission, for the purpose of disposing only of the joint motion before it for an immediate interim order reducing rates, in the above entitled matters, finds that:

(1) The Natural Gas Pipeline Company of America is a corporation organized and existing under the laws of Delaware; is engaged in the transportation of natural gas in interstate commerce by means of its 24-inch natural gas main transmission pipe line, approximating 900 miles in length, extending from a point in the State of Oklahoma known as Gray's Junction through the States of Kansas, Nebraska, and Iowa, and into the State of Illinois to a point near Joliet; is also engaged in the sale in interstate commerce of natural gas so transported to various purchasers for resale for ultimate public consumption for domestic, commercial, industrial, and other uses; and is a "natural-gas company" within the meaning of the Natural Gas Act;

(2) The major portion, approximating 90%, of the natural gas transported and sold by the Natural Gas Pipeline Company of America is sold to the Chicago District Pipeline Company, for resale for public consumption, delivery being made near Joliet, Illinois;

(3) The Texoma Natural Gas Company is a corporation organized and existing under the laws of Delaware; is engaged in the production and gathering of natural gas in the Texas Panhandle field; is engaged in the transportation of natural gas in interstate commerce by means of its 24-inch natural gas main transmission pipe line, approximating 75 miles in length, extending from its compressor station in the State of Texas near Fritch into the State of Oklahoma to its sales meter and connection, near Gray's Junction, with the system of the Natural Gas Pipeline Company of America; is also engaged in the sale in interstate commerce of gas so transported to the Natural Gas Pipeline Company of America for resale for ultimate public consumption for domestic, commercial, industrial, and other uses; and is a "natural-gas company," within the meaning of the Natural Gas Act;

(4) The major portion, approximately 90% of the natural gas so produced and gathered by the Texoma [fol. 5] Natural Gas Company is transported and sold by it to the Natural Gas Pipeline Company of America at the aforesaid delivery point near Gray's Junction, Oklahoma;

(5) The Illinois Commerce Commission is a "State commission" within the meaning of the Natural Gas Act;

(6) The rates and charges, demanded, observed, charged, and collected by the Natural Gas Pipeline Company of America and the Texoma Natural Gas Company, defendants-respondents herein, for the transportation and the sales of natural gas in interstate commerce, set forth in findings Nos. (1) to (4), inclusive, together with the rules, regulations, practices, and contracts, affecting such rates and charges, are subject to the jurisdiction of this Commission;

(7) The Natural Gas Pipeline Company of America and Texoma Natural Gas Company, defendants-respondents, are under substantially common control and ownership, are but arms of the same organization, being virtual departments of the same, and are in all substantial respects operated as a single enterprise, for the production, gathering, transportation, sale, and delivery of natural gas;

(8) Until further order of this Commission and for the purpose of disposing of the motion before us, a rate base composed of the Companies' estimates may be accepted, as follows:

Reproduction Cost New of Physical Properties (exclusive of gas reserves) as of June 1, 1939	\$56,302,250
Value of Gas Reserves as of June 1, 1939	13,334,775
Capital Additions from June 1, 1939, to December 31, 1942	3,808,399
Working Capital	975,000
Rate Base	\$74,420,424

(9) The total capital expenditures of the Companies through December 31, 1954, less salvage (including all capital expenditures to date), based upon the Companies' estimates, will be not more than \$78,284,009, which is the amount on which provision for amortization should be calculated;

[fol. 6] (10) The period over which the provision for amortization should be calculated is the entire life of the properties, estimated by the Companies to be 23 years, 1932-1954, inclusive;

(11) The annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the amortization reserve at the rate of $6\frac{1}{2}\%$ per year, compounded annually;

(12) The required annual allowance for amortization is \$1,557,852;

(13) The fair rate of return for the Companies is not more than $6\frac{1}{2}\%$ per annum;

(14) The annual amount necessary for a fair return to the Companies is not more than \$4,837,328, which, with the addition of the annual allowance of \$1,557,852 for amortization in (12) above, amounts to a total of \$6,395,180, for amortization and a fair return;

(15) The Companies' annual net revenues available for amortization and return, based upon the Companies' estimates, averaged for 1939 to 1942, inclusive, will be \$9,511,454, which will be reduced to approximately \$9,362,032 as a result of the calculated increase in Federal taxes under the 1940 Revenue Act;

(16) The Companies' annual net revenues (as found in (15) above) available for amortization and return, exceed the amount reasonably necessary as found in (14) above, by \$2,966,852;

(17) A reduction in annual net revenues of \$2,966,852, together with the consequent reduction in the applicable Federal Income Tax, would permit a reduction in rates (gross operating revenues) of \$3,750,000;

(18) The rates and charges made, demanded, or received by defendants-respondents for or in connection

with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption are unjust, unreasonable and excessive;

(19) The rates and charges of defendants respondents, after reflecting the reductions hereinafter ordered, will be just and reasonable;

Therefore, the Commission orders that:

(A) The rates and charges made, demanded, or received by defendants-respondents for or in connection [fol. 71] with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption shall be reduced to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America;

(B) Defendants-respondents shall file on or before August 15, 1940, new schedules of rates and charges for or in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, which shall reflect the reduction in operating revenues ordered in paragraph (A) above, which new schedules of rates and charges shall be effective as to all bills regularly rendered on or after September 1, 1940;

(C) The Commission reserves the right to reject all or any part of such new schedules and in lieu thereof to prescribe the same by further order;

(D) On and after the effective date of the new schedules of rates and charges filed and made effective in accordance with paragraph (B) above, defendants-respondents shall cease and desist from making, demanding, or receiving any rates and charges which do not reflect the reduction ordered in paragraph (A) above;

(E) The record therein shall remain open for such further proceedings as the Commission may deem necessary or desirable;

(F) The motion by defendants-respondents to dismiss the motion for immediate interim order reducing rates for want of jurisdiction be and the same is denied;

(G) The motion by defendants-respondents to dismiss the motion for immediate interim order reducing rates for want of sufficient evidence of record be and the same is denied;

(H) This order shall not be construed as an acquiescence by this Commission in any estimates or determinations of original cost, or any valuation of property, claimed or asserted by said defendants-respondents.

By the Commission.

Leon M. Fuquay, Secretary.

[fols. 8-9] BEFORE FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly. John W. Scott and Clyde L. Seavey not participating.

* * (Caption—G-109 and G-112) * *

ORDER GRANTING IN PART AND DENYING IN PART A MOTION
FOR A STAY OF THE COMMISSION'S ORDER OF JULY 23, 1940—
August 8, 1940

Upon application filed with the Commission on August 8, 1940, by Natural Gas Pipeline Company of America and Texoma Natural Gas Company, praying that the operation of the Commission's order dated July 23, 1940, in the above entitled matter, be stayed and suspended pending the filing of a motion for rehearing and the disposition of such motion and, in the event such motion be denied, pending the review of said order by the courts on appeal;

The Commission orders that:

(A) Paragraph (B) of the Commission's order adopted July 23, 1940, in this proceeding be and it is hereby amended to extend the time of filing of new schedules of rates and charges to on or before September 1, 1940;

(B) The application of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, referred to above, be and it is hereby denied except as provided in paragraph (A) above.

By the Commission.

J. H. Gutride, Acting Secretary.

[fol. 10] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1940

No. 7454

~~NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA~~
~~NATURAL GAS COMPANY, Petitioners,~~

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

PETITION FOR REVIEW OF INTERIM RATE ORDER OF FEDERAL
POWER COMMISSION—Filed September 11, 1940

To said Honorable Court:

Natural Gas Pipeline Company of America, a corporation,
and Texoma Natural Gas Company, a corporation,
hereinafter called petitioners, respectfully show:

I

Each of petitioners is a private corporation organized and existing under and by virtue of the laws of the State of Delaware, and each is located and has its principal place of business at 20 North Wacker Drive, in the City of Chicago, State of Illinois, within the Seventh Circuit.

II

Respondent Federal Power Commission is a Government commission created by an act of Congress, having its principal office and place of business in the City of Washington, District of Columbia.

Respondent Illinois Commerce Commission is a state commission created by an act of the Legislature of Illinois, having its principal office and place of business at Springfield, [fol. 11] Illinois, and also an office in Chicago, Illinois, both Springfield and Chicago being within the Seventh Circuit.

III

Petitioners seek a review of a so-called interim order directing petitioners to file a new schedule of rates and charges to effect a reduction in their operating revenues in the amount of \$3,750,000 a year, entered and issued by respondent Federal Power Commission on July 23, 1940,

and amended by supplemental order dated August 8, 1940, under purported authority of the Natural Gas Act (15 U. S. C., Chapter 15B). The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)).

IV

Since about January 1, 1932, petitioners have been, and they are at this time, engaged in the business of producing and purchasing natural gas and in transporting and selling at wholesale such natural gas in interstate commerce. Petitioner Texoma Natural Gas Company owns large reserves of gas in what is commonly known as the Panhandle gas field, in the State of Texas, which reserves underlie a great number of gas leases acquired, consolidated, developed and held by said petitioner. On its leases said petitioner has drilled many wells, from which it produces natural gas into a pipeline gathering system by it constructed, owned and operated, through which it transports such gas to its compressor station near the town of Fritch, in the State of Texas, and thence through its main pipeline to a point near Gray Junction, Oklahoma, where it sells and delivers such natural gas to petitioner Natural Gas Pipeline Company of America. At such point near Gray Junction, Oklahoma, the petitioner last named receives and purchases from petitioner Texoma Natural Gas Company three-fourths of its total market requirements and from Colorado-Interstate Gas Company one-fourth of its total market requirements, and transports such gas in interstate commerce along and through its 24 inch pipeline to Joilet, Illinois, and intermediate points, at which it sells and delivers 98% of such natural gas at wholesale to utilities which in turn resell the [fol. 12] same to the public for domestic, commercial and industrial uses. The remaining 2% of such natural gas the petitioner last named sells directly to industrial users along its pipeline. Petitioners are operated as a single enterprise, and all the profits of the combined operations of petitioners accrue to petitioner Natural Gas Pipeline Company of America, petitioner Texoma Natural Gas Company being operated on a non-profit basis.

V

Following the enactment of the Natural Gas Act, approved June 21, 1938, respondent Illinois Commerce Com-

mission, purporting to act under Section 13 of the Natural Gas Act (15 U. S. C. 717 1), on or about September 23, 1938, filed with respondent Federal Power Commission a complaint alleging that the rates and charges of petitioners for natural gas sold in the State of Illinois were unjust and unreasonable, requesting that an order be entered directing petitioners to appear and show cause why the rates charged by petitioner Natural Gas Pipeline Company of America to utilities in Illinois should not be reduced, and requesting that an order be entered setting fair, just and reasonable rates for natural gas sold by said petitioner in the State of Illinois.

Respondent Federal Power Commission did not issue a rule on petitioners to show cause why their rates and charges for gas sold in the State of Illinois should not be reduced; but on or about October 14, 1938, it entered an order reciting the filing of the above mentioned complaint and instituting an investigation of petitioners to determine with respect to each of them whether their rates and charges in connection with the transportation and sale of natural gas subject to the jurisdiction of the Federal Power Commission were unjust, unreasonable, unduly discriminatory or preferential, and, in the event it should find any such rates and charges to be unjust and unreasonable, to determine and fix, by appropriate order or orders, reasonable and non-discriminatory rates and charges.

On November 16, 1938, petitioners filed an answer to said complaint of respondent Illinois Commerce Commission, in [fol. 13] which they denied that the rates or charges for natural gas sold by petitioner Natural Gas Pipeline Company of America to utilities in the State of Illinois are unjust and unreasonable, and denied also other allegations contained in the complaint. In said answer they denied and challenged any jurisdiction, power or authority of respondent Federal Power Commission to enter any order attempting to change, modify or set aside any charge or price for natural gas sold by petitioners to utilities in the State of Illinois or elsewhere, or to substitute or prescribe any different charges or prices therefor, on the ground that petitioners constitute a single enterprise engaged in the business of owning natural gas reserves, developing same through the drilling and equipping of wells thereon, producing natural gas therefrom, transporting same through their own pipelines and facilities to points in the States of Kan-

sas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that petitioners' enterprise is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction, power or authority to enact legislation purporting to authorize respondent Federal Power Commission to regulate the prices and charges for which their commodity is sold. Petitioners also alleged that the Natural Gas Act, in so far as it purports to confer on respondent Federal Power Commission jurisdiction or power to change, modify or set aside the charges or prices at which petitioners sell natural gas at wholesale to distributors or to authorize it to set up and prescribe different charges or prices for such commodity, is invalid, and that any rules, regulations or orders promulgated by respondent Federal Power Commission with a view of attempting to exercise any such purported jurisdiction are null and void and unenforceable as against petitioners because the inevitable operation and effect thereof will be to deprive petitioners of their property and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 14]

VI

On or about April 14, 1939, respondent Federal Power Commission entered an order consolidating for purposes of hearing the complaint and investigation above mentioned and setting a public hearing in the proceedings, to be held before a trial examiner, commencing on May 8, 1939.

VII

At the opening session of the hearing beginning on May 8, 1939, counsel for respondents called to the stand two witnesses who testified concerning some of the geological, engineering and accounting issues involved. At subsequent sessions of the hearing held from time to time through the summer and fall of 1939, petitioners offered their direct testimony, calling a total of 37 witnesses. Some of these witnesses testified to the facts concerning the history and operation of petitioner's business, the enterprise and pioneering of petitioners in the planning, designing and construction of their pipelines and other facilities, the extraor-

dinarily high stresses and pressures under which petitioners' facilities have been and are operated, the unusually high annual load factor developed and maintained by petitioners in the operation of their business, the extent of their reserves, the geological and engineering conditions under which they produce and will produce their gas through the future life of the field, the effect of the pressures and other geological conditions in the field on the productive capacity of the wells, and the additional capital outlays which petitioners must incur in the drilling and equipping of wells and in the building of field gathering lines, field compressor stations, and other facilities during the future life of the field.

Other witnesses testified to past capital outlays and replacement costs, ultimate salvage values, maintenance and operating expenses, and other necessary and proper expenses incurred and to be incurred in connection with the operation of petitioners' business, and to the sales and earnings by petitioners since the beginning of their operations and the probable sales and earnings by petitioners in their [fol. 15] operations in the future. Experts testified concerning the cost of reproducing new at the present time the depreciable physical facilities now used by petitioners, the state of depreciation of the existing depreciable facilities, the net figures showing the reproduction cost new less observed depreciation, and the present fair value of petitioners' gas reserves in their depleted condition.

Experts testified to the going concern value of petitioners' properties, to the actual cost of acquiring such going concern value, and to the cost of reproducing it at the present time.

Several witnesses testified to various mechanical risks and hazards inherent in the natural gas business and to those special hazards confronting petitioners by reason of the operation of their facilities under the extremely high pressures and tensions and the topography of the country traversed by petitioners' lines. Other risks and hazards confronting generally those engaged in the natural gas business, and petitioners in particular, were pointed out in the testimony.

Other witnesses testified to the proper method of handling a sinking fund looking to its ultimate return with interest to petitioners at the time their reserves shall be exhausted, and pointed out the types of securities available for such

investment and the yields which could be obtained through the investment of funds in such securities.

Petitioners caused an exhibit to be prepared and offered in evidence, summarizing the figures showing the total amount invested and to be invested, the total charges for maintenance, operations and other costs, including taxes incurred and to be incurred, the revenues received and to be received over the entire life of the project, beginning on January 1, 1932, and ending with the year 1954, the latest year through which petitioners will have gas available from their reserves under the most favorable circumstances, from which it appeared that over the whole period petitioners will have earned an amount which, after returning to them their total investment and all operating costs and expenses, will yield them a return on their average investment [fol. 16] of only 6.39% per annum. This exhibit was offered as showing that, over the whole period covered by the limited life of petitioners' business, petitioners' prices and charges for natural gas are not unjust and unreasonable.

Petitioners offered another exhibit, summarizing the figures showing the reproduction cost new less observed depreciation of the physical properties other than gas reserves, the present fair value of the gas reserves, the going concern value of petitioners' properties, the cost of future additional capital assets and of capital replacements, the ultimate salvage value of the properties, the necessary working capital, the expense of maintaining and operating petitioners' facilities and conducting their business in the past and in the future, the past and prospective revenues, and other pertinent figures, from which it appeared that petitioners probably will earn over the future life of their reserves, after a proper allowance for the amortization of the present value of their properties, a return on the proper rate base of 4% per annum.

Petitioners offered another exhibit showing substantially the same figures as the exhibit last described except that, as pointing to the present fair value of petitioners' properties, they showed the original cost of the present properties instead of the reproduction cost new less observed depreciation of the properties other than gas reserves and the present fair value of the gas reserves. The figures used as a basis of this exhibit show that, after setting aside an amount each year sufficient to return the present value of the

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properties by the time petitioners' reserves of gas are exhausted, petitioners will receive an annual return on the proper rate base of 5.1% per annum.

These exhibits, in so far as they deal with the future, were based on figures developed through the testimony of experts who testified concerning the necessary expenditures and the probable revenues during the future life of petitioners' reserves. The figures dealing with going concern value were those developed by the witnesses who testified on that subject. The annual allowance for amortization was calculated on a sinking fund formula, using the compound [fol. 17] interest rate to which the witnesses testified as the return which petitioners could reasonably expect from the investment of their sinking fund allowances in the highest types of securities.

Four expert witnesses were called by petitioners to testify on the subject of rate of return. These witnesses, after testifying at great length and after producing and introducing a large number of statistical tabulations, graphs and charts, and after testifying at length concerning the risks involved in petitioners' business and the reaction of the investing public to such risks as shown by the figures, charts and graphs contained in the exhibits produced by the witnesses, arrived at the opinion that a minimum of 8% per annum would be a fair and reasonable return to petitioners on the fair value of their property. Two of these witnesses testified that 8% would not be an adequate return and expressed their judgment that a higher rate of return would be required.

VIII

On October 6, 1939, petitioners announced that they had concluded their direct testimony. Thereafter counsel for respondents, after cross examining seven of petitioners' witnesses, including the four experts who had testified on rate of return, called to the stand four witnesses, two of whom were employees of respondent Federal Power Commission and the other two employees of respondent Illinois Commerce Commission, who testified to statistics and produced statistical exhibits dealing with interest rates, cost of financing through issuance of securities, and other matters ordinarily offered in connection with rate of return studies. Two of these witnesses confined their testimony to statistical facts without undertaking to appraise or analyze their testi-

mony and apply it to the subject of rate of return. Another testified to his conclusion as to the cost of refinancing petitioners' properties. The fourth witness, an employee of respondent Illinois Commerce Commission, testified to a conclusion that 6% per annum on the present fair value of petitioners' properties would be a reasonable return. These four witnesses were later cross examined by petitioners at a session of the hearing concluded on December 14, 1939, at [fol. 18] which session petitioners also offered some testimony on redirect examination of two of their witnesses on rate of return. Subsequently, at a session of the hearing held on January 8, 9 and 10, 1940, petitioners offered redirect testimony by two of their witnesses on rate of return and some testimony in rebuttal of the testimony offered by respondents on that subject.

IX

On November 7, 1939, at the conclusion of the direct examination by counsel for respondents of their four witnesses who testified on the subject of rate of return, but prior to the cross examination of such witnesses by petitioners and prior to the offering of any redirect or rebuttal testimony by petitioners on the subject of rate of return, counsel for respondents filed with the Examiner as a part of the record a motion for an immediate interim order by respondent Federal Power Commission setting up rates and charges that would operate to reduce the revenues of petitioners by a sum of \$3,000,000 to \$3,500,000 annually. At the time such motion was offered, counsel for respondents announced that they were not resting their case. In the motion counsel for respondents stated that the cross examination of petitioners' witnesses, the introduction of respondents' evidence, the taking of petitioners' rebuttal evidence and cross examination thereon will consume much additional time, so that the closing of the case will be delayed for a long time in the future.

X

Pursuant to the direction of respondent Federal Power Commission, said motion for interim order was set for argument before respondent Federal Power Commission as a whole on December 18, 1939, on which date petitioners appeared and filed pleas to the jurisdiction of respondent Federal Power Commission to enter an interim order, and

also a conditional answer in reply to said motion for interim order. Respondent Federal Power Commission denied a request by petitioners that they be permitted to present their pleas to the jurisdiction before the hearing on the motion and that they be allowed to open and close the argument [fol. 19] on such pleas. In that connection counsel for petitioners pointed out to said respondent that they had had no opportunity to prepare themselves for argument on the merits of the motion, due to the circumstance that they had been continuously engaged in preparing and offering their testimony before the Examiner from the time said motion was filed. Counsel for respondents presented their arguments in support of the motion for interim order and petitioners were heard in reply on their pleas to the jurisdiction. On the same date petitioners filed their brief in support of their pleas to the jurisdiction.

Later counsel for respondents filed their briefs in support of the motion and petitioners filed their brief in reply.

No further proceedings were had in the hearing subsequent to January 10, 1940, until July 23, 1940, on which date respondent Federal Power Commission issued a written opinion and an interim order, which it caused to be served on petitioners on August 1, 1940, the effect of which was to direct petitioners, prior to August 15, 1940, to file new schedules of rates and charges for gas sold at wholesale which would operate to reduce petitioners' net revenues available for amortization and return by the sum of at least \$3,750,000 per annum, which new rates and charges should be effective as to all bills regularly rendered on or after September 1, 1940. Prior to the issuance of such opinion and order petitioners had no notice of the contents or effect thereof, no report of the Examiner to respondent Federal Power Commission on the issues of law or of fact ever having been submitted to petitioners.

XI

On August 8, 1940, petitioners filed with respondent Federal Power Commission their verified motion for a stay of the order of said respondent dated July 23, 1940, pending the filing of petitioners' motion for rehearing and the action of said respondent thereon. On the same date said respondent entered an order denying said petition in all things

except that the time for the filing of new schedules of rates and charges was extended to on or before September 1, 1940.

[fol. 20]

XII

On August 19, 1940, petitioners filed with respondent Federal Power Commission their application for rehearing, in which they set forth specifically the grounds upon which said application was based.

XIII

On the 6th day of September, 1940, said respondent entered an order denying petitioners' application for rehearing, which order was served on petitioners on September 9, 1940.

XIV

Pursuant to Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)), petitioners present their petition for a review of said order of respondent Federal Power Commission issued July 23, 1940, as modified by the order of said respondent dated August 8, 1940, together with a statement of the points upon which petitioners rely as grounds for a decree of this Court reversing, setting aside and annulling said order of respondent Federal Power Commission. All the points submitted herewith as grounds for reversing, setting aside and annulling said order were urged before respondent Federal Power Commission in the application for rehearing submitted by petitioners to said respondent as aforesaid. Reference is here made to the statement of points attached hereto, which is made a part of this petition.

XV

For the reasons expressly set forth in the statement of points attached hereto, said order of respondent Federal Power Commission, as modified, is erroneous and operates, and will continue to operate, to confiscate petitioners' property, property rights and revenues and to take petitioners' property, property rights and revenues without due process of law, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States; and, for the reasons set forth in said statement of points, said order, as modified, should be reversed, set aside and held for naught.

[fol. 21] Wherefore petitioners pray :

(a) That a copy of this petition forthwith be served upon some member of respondent Federal Power Commission in pursuance of Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)), and upon respondent Illinois Commerce Commission;

(b) That respondent Federal Power Commission be required, in conformity with the Natural Gas Act, to certify and file with the Court a transcript of the record upon which the order complained of in this petition was entered, including the testimony, evidence and exhibits admitted, pleadings, opinion, findings, conclusions, and orders of said respondent in the proceedings above referred to;

(c) That this Honorable Court review the proceedings, including the testimony, evidence and exhibits admitted, pleadings, opinion, findings, conclusions and orders in the proceedings out of which the said order of July 23, 1940, issued;

(d) That said order of July 23, 1940, in so far as it purports to direct that the rates and charges made, demanded or received by petitioners for or in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption shall be reduced to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of petitioner Natural Gas Pipeline Company of America, and in so far as it, as modified, directs that petitioners shall file on or before September 1, 1940, new schedules of rates and charges which shall reflect such reduction in operating revenues, be reversed, set aside and held for naught;

(e) That this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition and grant to petitioners such other and further relief in the premises as the rights and equities of the cause may show to be necessary and proper.

[fol. 21a] Natural Gas Pipeline Company of America and Takoma Natural Gas Company, Petitioners,
By J. J. Hedrick, 20 North Wacker Drive, Chicago,
Ill., George I. Haight, 209 South LaSalle St., Chi-
cago, Ill., S. A. L. Morgan, 20 North Wacker Drive,
Chicago, Ill., Attorneys for Petitioners.

Haight, Goldstein & Hobbs, 209 South LaSalle St., Chicago, Ill., Morgan, Culton, Morgan & Britain, Amarillo, Texas, Of Counsel.

Duly sworn to by Floyd C. Brown. Jurat omitted in printing.

[fol. 22] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October Term, 1940.

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

STATEMENT OF POINTS—Filed September 11, 1940

To Said Honorable Court:

Pursuant to Paragraph 3 of Rule 36 of this Court, petitioners, Natural Gas Pipeline Company of America and Texoma Natural Gas Company, in connection with their petition for review of an order of respondent Federal Power Commission dated July 23, 1940, as modified by an order dated August 8, 1940, file the following statement of points on which they rely as grounds for reversing and setting aside said order. These points, numbered consecutively from 1 to 37, inclusive, were all urged in the same order as objections or assignments of error before respondent Federal Power Commission in petitioners' application for rehearing filed with said respondent on August 19, 1940.

Respondent Federal Power Commission will be referred to hereafter as the Commission; and respondent Illinois Commerce Commission will be referred to as complainant.

[fol. 23]

Point 1

The Commission erred in holding that it has authority under the Natural Gas Act to change, modify or set

aside the charges and prices at which petitioners are selling natural gas in interstate commerce at wholesale, it appearing from the record without contradiction that petitioners, constituting a single enterprise, are engaged in the business of owning natural gas reserves in the State of Texas, developing such reserves through the drilling and equipping of wells thereon, producing natural gas therefrom in quantities equal to three-fourths of their total market requirements, purchasing gas from others in quantities equal to one-fourth of their market requirements, transporting the gas so produced and purchased through their own pipelines and facilities to points in the States of Kansas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that their business is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction, power or authority to enact legislation purporting to authorize the Commission to regulate the charges or prices for which such commodity is sold; and that the necessary operation of any order purporting to reduce, change or modify such charges would deprive petitioners of their property and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (Commission's memorandum opinion No. 49, p. 9; Commission's order reducing rates, finding No. 6, p. 3.)

Point 2

The Commission erred in overruling petitioners' second plea to the jurisdiction of the Commission dated December 18, 1939, and in holding that it has jurisdiction under the Natural Gas Act to reduce the prices at which petitioners are selling natural gas, by interim order or otherwise, pending the final termination of the proceedings and hearing now pending before the Commission and its Examiner, and pending a finding by the Commission, after the conclusion of the hearing and after petitioners have had an opportunity to be heard on their briefs and arguments on the facts presented by the whole record and the law applicable thereto, that the rates and prices charged and collected

by petitioners are unjust, unreasonable, unduly discriminatory or preferential. (Commission's memorandum opinion No. 49, pp. 10-13.)

Point 3

The Commission erred in holding that under the Natural Gas Act it has power and jurisdiction to enter an interim order pending the final termination of the hearing now pending and an opportunity by petitioners to be heard by brief and oral argument on the law and the facts presented by the whole record, since no such power or jurisdiction is conferred upon the Commission by the Natural Gas Act, either in express terms or by necessary implication. (Commission's memorandum opinion No. 49, pp. 10-13.)

[fol. 24]

Point 4

The Commission erred in holding that in these proceedings petitioners have had a *hearing* within the meaning of Section 5(a) of the Natural Gas Act (15 U. S. C., 717d(a)), which provides that "whenever the Commission, after a hearing * * * shall find that any rate, charge, * * * is unjust, unreasonable, * * * the Commission shall determine the just and reasonable rate, charge, * * * and shall fix the same by order." (Commission's memorandum opinion No. 49, pp. 10-13.)

Point 5

The Commission erred in denying the request of petitioners that the issues of fact and of law raised by the motion on which the Commission's order of July 23, 1940, is based and by the briefs in support thereof be referred to the Examiner for a very careful analysis and consideration after receiving briefs and oral argument from counsel for the interested parties, and that the Commission have the formal recommendations of the Examiner on the issues, both of fact and of law, and the exceptions of petitioners thereto, if any, before the Commission should consider the entering of an interim order reducing petitioners' revenues.

Point 6

The Commission erred in not holding that the burden of proof rests upon complainant and counsel for the Commission to establish that petitioners' existing charges are unjust and unreasonable, and that such burden has not been discharged.

Point 7

The Commission erred in not holding that when and if complainant and counsel for the Commission discharged their burden of showing that petitioners' rates and charges are unjust and unreasonable, the burden was then upon complainant and counsel for the Commission to show what rates and charges would be just and reasonable, and that such second burden has not been discharged.

Point 8

The Commission erred in finding that the rates and charges presently charged by petitioners are unjust, unreasonable, unlawful and violative of the provisions of the Natural Gas Act. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 18, p. 4.)

Point 9

The Commission erred in establishing the following rate base:

[fol. 25] Reproduction cost new of physical properties (exclusive of gas reserves as of June 1, 1939)	\$56,302,250
Value of gas reserves as of June 1, 1939	13,334,775
Capital additions from June 1, 1939, to December 31, 1942	3,808,399
Working capital	975,000
Rate base	\$74,420,424

(Commission's memorandum opinion No. 49, p. 19; Commission's order reducing rates, finding No. 8, p. 3.)

Point 10

The Commission erred in not allowing as the proper rate base the items and amounts set out in petitioners' reply brief dated February 15, 1940, p. 251, as follows:

Reproduction cost new exclusive of gas reserves	\$56,302,250
Less "viewed" depreciation	2,866,758
Present value of physical properties exclusive of gas reserves	\$53,435,492
Present value of gas reserves	13,334,775
Allowance for future capital expenditures	6,046,286
Going concern value	8,500,000
Working capital	975,000
Rate base	\$82,291,553

Point 11

The Commission erred in not holding that the proper rate base is the present value of the property, which, under the uncontradicted evidence, is made up of the reproduction cost new less viewed or actual depreciation of the depreciable properties, the value of the gas reserves, the going concern value, the working capital, and a proper allowance for future capital expenditures aggregating \$82,291,553. (Defendants' reply brief dated February 15, 1940, p. 251.)

Point 12

The Commission erred in attempting to apply its own theory as to undepreciated rate base by placing on the gas reserves the present value of those reserves in their depleted condition. (Defendants' reply brief dated February 15, 1940, pp. 144-161.)

[fol. 26]

Point 13

The Commission erred in making no allowance for going concern value in fixing the rate base and in fixing the amount to be amortized. (Commission's memorandum opinion No. 49, p. 19.)

Point 14

The Commission erred in holding that the sum of \$8,500,000 claimed by petitioners as going concern value is an arbitrary claim not supported by substantial evidence, it appearing from the uncontradicted evidence that said sum of money represents the aggregate of expenditures actually made and costs actually sustained in developing the market outlets for petitioners' gas up to the normal capacity of the lines; that such expenditures and costs were reasonable; and that at least that amount would have to be expended in attaching business if petitioners were now at the beginning of their operations. (Commission's memorandum opinion No. 49, p. 19.)

Point 15

The Commission erred in reducing the amount allowed for future capital expenditures from \$6,046,286, as claimed by petitioners, to \$3,808,399, thus eliminating from the amount allowed all future capital expenditures after December 1, 1942, it appearing from the uncontradicted evidence that the amounts claimed by petitioners for capital expenditures after the date last mentioned certainly and definitely will be made and that the property acquired through such expenditures will be devoted to petitioners' business. (Commission's memorandum opinion No. 49, pp. 17, 18 and 19; Commission's order reducing rates, finding No. 8, p. 3.)

Point 16

The Commission erred in holding that the total investment, by which it manifestly means original cost, in contradistinction to fair value, less the salvage value at the end of petitioners' business, should be amortized. (Commission's memorandum opinion No. 49, pp. 20 and 21.)

Point 17

The Commission erred in holding that the proper amount to be amortized is \$78,284,009. (Commission's memorandum opinion No. 49, p. 21; Commission's order reducing rates, finding No. 9, p. 3.)

Point 18

The Commission erred in not holding that the proper amount to be amortized is \$84,341,218, representing the present fair value of petitioners' present properties, including going concern value and working capital, plus future expenditures for additional capital assets, less the liquidating salvage value at the end of the project's life. (Commission's memorandum opinion No. 49, pp. 20-22.)

[fol. 27]

Point 19

The Commission erred in holding that the proper amortization period should be the total estimated life of the business, namely, 23 years from the beginning of 1932 to the end of 1954. (Commission's memorandum opinion No. 49, pp. 20-21; Commission's order reducing rates, finding No. 10, p. 3.)

Point 20

The Commission erred in not holding that the proper amortization period should be the period intervening from the present time to the end of the project's life, which, under the uncontradicted evidence, will be sometime prior to December 31, 1954. (Commission's memorandum opinion No. 49, p. 20.)

Point 21

The Commission erred in holding that the annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the amortization reserve at the rate of $6\frac{1}{2}\%$ per annum, compounded annually. (Commission's memorandum opinion No. 49, pp. 21-22; Commission's order reducing rates, finding No. 11, p. 3.)

Point 22

The Commission erred in not holding, under the uncontradicted evidence, that the annual allowance for amortization should be calculated on a straight line basis, or in any event on a sinking fund basis with interest credited to the amortization reserve at the rate of 2% per annum, compounded semi-annually.

(Commission's memorandum opinion No. 49, pp. 21-22.)

Point 23

The Commission erred in holding that it is fair and equitable, in computing the amortization to be charged as an operating expense under the sinking fund formula, to use an interest rate of $6\frac{1}{2}\%$, the allowed rate of return. (Commission's memorandum opinion No. 49, pp. 21-22.)

Point 24

- The Commission erred in not holding that in computing the annual reserve for amortization an interest rate of not more than 2% per annum, compounded semi-annually, should be used. (Commission's memorandum opinion No. 49, pp. 21-22.)

Point 25

The Commission erred in holding that as an annual reserve for amortization the sum of only \$1,557,852 should be allowed. (Commission's memorandum opinion No. 49, pp. 22 and 26; Commission's order reducing rates, finding No. 12, p. 3, and finding No. 14, p. 4.)

[fol. 28]

Point 26

The Commission erred in not holding that the proper annual allowance for amortization is at least \$5,100,732.

Point 27

The Commission erred in eliminating from the allowance for operating expenses the items representing replacements of capital assets subsequent to August 1, 1940, in an amount averaging \$188,054 per annum. The estimated cost of these items is included in the \$78,284,009 erroneously allowed by the Commission as the proper amount for amortization. However, in estimating petitioners' average income available for amortization and return for the period from August 1, 1940, to and including December 31, 1942, the Commission disregarded the estimated cost of replacements during that period. Petitioners point out that the Commission failed to include such costs among the operating expenses, thus under its own theory arriving at an amount

\$188,054 greater than the correct amount available for amortization and return under such theory.

Point 28

The Commissioner erred as a matter of law in finding that 6½% per annum on the rate base allowed is a fair rate of return for petitioners, there being no substantial evidence to support the finding. The allowed rate of return purports to cover only the cost of capital, based on the testimony of an employee of the Commission whose conclusion on that point is not supported by his own factual premise. No allowance is made for efficiency and skill in design and engineering, through which petitioners are able to operate their facilities under extraordinarily high stresses and to transport gas at extraordinarily high pressures, and efficiency in management in attaining and maintaining an average load factor more than 30% higher than that ordinarily attained by other pipelines, which efficiency and skill account for at least \$1,200,000 of petitioners' annual revenues, according to the uncontradicted testimony. (Commission's memorandum opinion No. 49, pp. 23-26; Commission's order reducing rates, finding No. 13, p. 3.)

Point 29

The Commission erred in not finding that the fair rate of return for petitioners is not less than 8%.

Point 30

The Commission erred in holding that the annual amount necessary for a fair return to petitioners is not more than \$4,837,328 and that the proper allowance for amortization is \$1,557,852, or a total of \$6,395,180 for fair return and amortization. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 14, p. 4.)

[fol. 29]

Point 31

The Commission erred in finding that petitioners' annual net revenues available for amortization and return exceed the amount reasonably necessary by \$2,966,852. (Commission's memorandum opinion No.

49, p. 26; Commission's order reducing rates, finding No. 16, p. 4.)

Point 32

The Commission erred in ordering that the rates and charges made, demanded or received by petitioners in connection with their transportation and sale of natural gas shall be reduced to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, paragraph (A), p. 4.)

Point 33

The Commission erred in finding that the rates and charges after reflecting the reductions ordered will be just and reasonable. (Commission's order reducing rates, finding No. 19, p. 4.)

Point 34

The Commission erred in ordering that petitioners file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America effective as to all bills regularly rendered on or after September 1, 1940. (Commission's order reducing rates, paragraph (B), p. 4; Commission's order dated August 8, 1940, paragraph (A).)

Point 35

The Commission erred in ordering that from and after the effective date of the new schedules ordered to be filed petitioners shall cease and desist from making, demanding or receiving any rates and charges which do not reflect the reduction ordered in Paragraph (A) of the Commission's order reducing rates. (Commission's order reducing rates, Paragraph (D), p. 5.)

Point 36

The Commission erred in denying petitioners' application for a stay of the Commission's order dated July 23, 1940, pending the filing of an application for rehearing and the disposition of such application, and, in the

event such application be denied, pending the review of said order by the courts on appeal. (Defendants-respondents' motion for stay filed August 8, 1940; Commission's order denying in part the motion for stay, dated August 8, 1940, Paragraph (b).)

Point 37

The Commission erred in denying petitioners' application for rehearing. (Commission's order dated September 6, 1940.)

[fol. 30] Respectfully submitted, Natural Gas Pipeline Company of America and Texoma Natural Gas Company, Petitioners, by J. J. Hedrick, 20 North Wacker Drive, Chicago, Ill., George I. Haight, 209 South LaSalle St., Chicago, Ill., S. A. L. Morgan, 20 North Wacker Drive, Chicago, Ill., Attorneys for Petitioners.

Haight, Goldstein & Hobbs, 209 South LaSalle St., Chicago, Ill.; Morgan, Culton, Morgan & Britain, Amarillo, Texas, of Counsel.

[File endorsement omitted.]

[fol. 31] Appearances of counsel omitted in printing.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

ORDER STAYING ORDER OF COMMISSION—November 1, 1940

The Federal Power Commission having overruled petitioners' petition for a rehearing of this cause; and petitioners, within sixty days of that ruling, having filed a written petition in this Court praying that the order of the Commission be modified or set aside in whole or in part,—it is therefore ordered by this Court that the order of the Commission herein be stayed until the further order of this

Court, under Section 19 of the Natural Gas Act, 15 U. S. C. 717r(c).

It is further ordered that the temporary restraining, or stay, order, pending petitioners' application for rehearing before the Federal Power Commission, issued August 30, 1940, be and the same is hereby dissolved.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7439-7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.

vs.

FEDERAL POWER COMMISSION, et al.

ORDER DENYING MOTION TO REINSTATE BOND, ETC.—November 26, 1940

It is ordered that the motion of counsel for respondent Illinois Commerce Commission that the order entered by this Court on November 1, 1940, injunction case No. 7439, be modified by requiring that the petitioners' bond in the penal sum of \$1,000,000 be reinstated and that the amounts in excess of said bond be deposited with the Clerk of this Court to await the final disposition of this cause, be, and the same is hereby, denied.

It is further ordered, as a condition to the stay of the Commission's order heretofore granted, in re petitioners' petition to review the order of the Commission No. 7454, that petitioners forthwith file their bond, without surety, in the penal sum of \$1,000,000, conditioned in all respects the same as in the former bond in No. 7439.

[fol. 34] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

BOND FOR STAY ORDER—Filed December 3, 1940

Natural Gas Pipeline Company of America, a corporation, and Texoma Natural Gas Company, a corporation,

acting herein by and through Floyd C. Brown, Vice President and General Manager of each, thereunto duly authorized, acknowledged themselves firmly bound to the Federal Power Commission and the Illinois Commerce Commission in the Penal sum of One Million Dollars (\$1,000,000).

The condition of this obligation is such that if the undersigned shall pay or cause to be paid to the purchasers at wholesale of natural gas from Natural Gas Pipeline Company of America, as their several interests appear, the amounts representing the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review of the order of the Federal Power Commission dated July 23, 1940, directing the undersigned Natural Gas Company of America to file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of said Natural Gas Pipeline Company of America together with all costs which may be adjudged against them, should said order last mentioned be sustained, then this obligation shall become null and void and of no further force and effect.

[fol. 35] Witness Natural Gas Pipeline Company of America and Texoma Natural Gas Company this 28th day of November, 1940.

Natural Gas Pipeline Company of America, (Signed)
by Floyd C. Brown, Vice President and General
Manager.

(Signed) C. F. Campbell. (Seal.)

Texoma Natural Gas Company, (Signed) by Floyd
C. Brown, Vice President and General Manager.

(Signed) C. F. Campbell. (Seal.)

Approved 12-3-40.

(Signed) William M. Sparks, Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,
 Petitioners,

vs.

FEDERAL POWER COMMISSION, et al., Respondents

ORDER APPROVING BOND—December 3, 1940

It is ordered that the Bond of petitioners filed this day in this cause, pursuant to the order entered by this Court on November 26, 1940, be, and it is hereby approved.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7439

[Title omitted]

[fol. 36] BOND FOR STAY ORDER—Filed August 30, 1940

Natural Gas Pipeline Company of America, a corporation, and Texoma Natural Gas Company, a corporation, acting herein by and through Floyd C. Brown, their Vice President and General Manager, thereunto duly authorized, acknowledged themselves firmly bound to the Federal Power Commission and the Illinois Commerce Commission in the sum of One Million Dollars (\$1,000,000).

The condition of this obligation is such that if the undersigned shall pay or cause to be paid to the purchasers at wholesale of natural gas from Natural Gas Pipeline Company of America, as their several interests appear, the amounts representing the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review of the order of the Federal Power Commission dated July 23, 1940, directing the undersigned Natural Gas Pipeline Company of America to file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of said Natural Gas Pipeline Company of America, together with all costs which may be adjudged against

them, should said order last mentioned be sustained, then this obligation shall become null and void and of no further force and effect.

Witness Natural Gas Pipeline Company of America and Texoma Natural Gas Company this 30th day of August, 1940.

Natural Gas Pipeline Company of America, (Signed)
by Floyd C. Brown, Vice President and General
Manager.

(Signed) C. F. Campbell, Secretary. (Seal.)

Texoma Natural Gas Company, (Signed) by Floyd
C. Brown, Vice President and General Manager.

(Signed) C. F. Campbell, Secretary. (Seal.)
Approved August 30, 1940.

William M. Sparks, Circuit Judge.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS

7439

ILLINOIS COMMERCE COMMISSION, Complainant,

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Defendants,

In the Matter of NATURAL GAS PIPELINE COMPANY OF AMER-
ICA and TEXOMA NATURAL GAS COMPANY

STAY ORDER—August 30, 1940

On August 29, 1940, came on to be heard in chambers before me, one of the Judges of this Court, the Clerk of the Court being in attendance, the petition of Natural Gas Pipeline Company of America, a corporation, and Texoma Natural Gas Company, a Corporation, for a temporary restraining order pending notice and a hearing on their verified petition for stay of an order issued by the Federal Power Commission on July 23, 1940. In the course of hearing on said petition, John E. Cassidy, Attorney General of Illinois, by Harry R. Booth, Assistant Attorney General, made his Appearance on behalf of Illinois Commerce Com-

mission. In the course of further proceedings on the petition, George Slaff, of counsel for Federal Power Commission, by Long Distance telephone from Washington, D. C., requested that the hearing be not concluded until the following day so that he might come to Chicago and be heard on the petition. Accordingly, at the conclusion of the arguments of counsel for petitioners and for the Illinois Commerce Commission, the hearing was recessed until August 30, 1940, at 9:30 A. M.: and upon a reconvening of the hearing at the time last mentioned, the said George [fo] 38] Slaff appeared on behalf of respondent Federal Power Commission and presented his arguments in opposition to the petition. When the arguments were about concluded, the Judge announced what his order would be, and thereupon the said George Slaff, of counsel for Federal Power Commission, for the first time announced that he had intended to appear specially, only for the purpose of questioning the jurisdiction of a Judge of the Court sitting in chambers to grant the stay order prayed for. Having considered said petition and the supporting memorandum brief and the arguments of counsel, it is

Ordered: that respondents, Federal Power Commission and Leland Olds, Claude L. Draper, Clyde L. Seavey, John W. Scott and Basil Manly, the persons constituting the Federal Power Commission, and their successors in office, and the Illinois Commerce Commission and William W. Hart, Robert Harper, James Marnane and Charles Byrne, the persons constituting the Illinois Commerce Commission, and their successors in office, and the agents and attorneys of said Federal Power Commission and of said Illinois Commerce Commission, be and they are enjoined and restrained, until further order of this Court from enforcing, causing to be enforced, or attempting to enforce the rate order issued against petitioners by the Federal Power Commission on July 23, 1940, as amended by order entered by said Commission on August 8, 1940, in proceedings before the Federal Power Commission, Docket Nos. G-109 and G-112, a copy of each of which orders is filed with said petition for stay as Exhibits H. and J., respectively, to the supporting memorandum brief; and

That said respondents, their successors in office, agents and attorneys, be and they are hereby enjoined and restrained, until further order of this Court, from taking

any steps or instituting any proceedings, or ~~causing~~ any steps to be taken or any proceedings to be instituted, against petitioners, their officers, agents or employees, to enforce any penalties, fines or other remedy for disregarding said rate order entered July 23, 1940, as amended: and [fol. 39] That this order will become effective upon the execution and delivery to the Clerk of this Court by petitioners of their joint and several bond in the penal sum of \$1,000,000, conditioned on their refunding to those who purchase natural gas from petitioners at wholesale, as their several interests appear, the amount represented by the reduction in revenues as directed by the Federal Power Commission in its order dated July 23, 1940, if the order last mentioned be sustained: and

That a copy of this order be served on the Federal Power Commission, on George Slaff, of counsel for the Federal Power Commission, on the Illinois Commerce Commission, and on Harvey R. Booth, Assistant Attorney General, for John E. Cassidy, Attorney General of Illinois, Attorney for Illinois Commerce Commission.

Dated at Chicago, Illinois, August 30, 1940.

(Signed) William M. Sparks, Circuit Judge.

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[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7439

NATURAL GAS PIPELINE COMPANY OF AMERICA, and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, and ILLINOIS POWER COMMISSION,
Respondents

Petition to Stay Order of Commissioner Pending Petitioners' Application for Rehearing Before the Federal Power Commission

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent

Petition to Set Aside or Modify Order of Federal Power Commission

ORDER STAYING ORDER OF COMMISSION—November 1, 1940

The Federal Power Commission having overruled petitioners' petition for a rehearing of this cause; and petitioners, within sixty days of that ruling, having filed a written petition in this court praying that the order of the Commission be modified or set aside in whole or in part,—it is therefore ordered by this court that the order of the Commissioner herein be stayed until the further order of this court, under section 19 of the Natural Gas Act, 15 U. S. C. 717r(c).

It is further ordered that the temporary restraining, or stay, order, pending petitioners' application for rehearing before the Federal Power Commission, issued August 30, 1940, in cause No. 7439, be and the same is hereby dissolved.

(Signed) William M. Sparks, J. Earl Major, Walter E. Treanor, United States Circuit Judges.

Nov. 1, 1940.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7439-7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,

vs.

FEDERAL POWER COMMISSION, et al.

ORDER DENYING MOTION TO REINSTATE BOND ETC.—November
26, 1940

It is ordered that the motion of counsel for respondent Illinois Commerce Commission that the order entered by this Court on November 1, 1940, injunction case No. 7439, be modified by requiring that the petitioners' bond in the penal sum of \$1,000,000 be reinstated and that the amounts in excess of said bond be deposited with the Clerk of this Court to await the final disposition of this cause, be, and the same is hereby, denied.

It is further ordered, as a condition to the stay of the Commission's order heretofore granted, in re petitioners' petition to review the order of the Commission No. 7454, that petitioners forthwith file their bond, without surety, in the penal sum of \$1,000,000, conditioned in all respects the same as in the former bond in No. 7439.

[fol. 42] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1941, APRIL
SESSION, 1942

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, RespondentsBefore Evans and Sparks, Circuit Judges, and Lindley,
District Judge

OPINION—Filed May 22, 1942

LINDLEY, District Judge:

The original petitioners seek further exercise of the jurisdiction of this court in determination and distribution of the

amounts payable by them, pursuant to and by virtue of the terms of the stay order entered and the bonds filed in the original proceeding and in restraint of suits in other forums.

On August 30, 1940, this court restrained temporarily, enforcement of the Federal Power Commission's rate order of July 23, 1940, upon condition that petitioners file a bond in the sum of \$1,000,000, conditioned as provided in the order. In November following, the court, under Section 19 (c) of the Natural Gas Act, entered an order staying the rate, dissolving the earlier temporary restraining order, and requiring, as a condition of the stay, a bond for \$1,000,000, in favor of the Federal Power Commission and the Illinois Commerce Commission conditioned for payment of the amounts representing the reduction in gross revenues of petitioners which might accrue pending review of the [fol. 43] order of the Commission directing petitioners to file new schedules of rates and changes effectuating reduction of not less than \$3,750,000 per annum in the operating revenue of petitioners. At that time petitioners represented to the court that they were amply solvent and could and would respond to any final judgment against them.

This court, upon final hearing, set aside the order of the Commission, 120 F. (2d) 625. Subsequently the Supreme Court reversed that judgment, — U. S. —. Since then, petitioners have filed with the Commission new rate schedules in conformity with the latter's original order which, by virtue of the decision of the Supreme Court, became effective as of the date of its entry. Petitioners have filed also copies of the schedules disclosing the amounts representing the reduction in rates which would have been made to their customers had the stay not been entered and had the scheduled rates been effective from the date of original order of the Commission July 23, 1940.

In their present petition, petitioners set forth the foregoing facts and aver that they are ready, able and willing to refund such amounts as we may deem properly payable as a result of the erroneous entry of the stay. They aver that this court has "exclusive jurisdiction, authority and obligation to regulate, control and direct the disposition of any funds payable because of the order staying the order of the Power Commission"; that, notwithstanding such sole jurisdiction, they have been sued both in the state and federal courts by ultimate consumers of the gas distributed and that unless we retain jurisdiction, they will be sub-

jected to numerous similar suits. They pray that the court reserve jurisdiction to determine all amounts payable by them under the terms of the bonds filed or as a result of the stay order, to the persons entitled to receive such payments, and the amount due each and that all persons claiming any right to such payments be enjoined from asserting their demands in any court other than this.

The Illinois Commerce Commission in its answer avers that the gas distributed passed eventually to ultimate consumers, approximately one million in number; that the rates charged by the distributing companies to their customers are fixed by the Illinois Commerce Commission largely upon and necessarily reflect the prices paid by the distributing companies to petitioners or their affiliate, the Chicago District Pipe Line Company; that the money represented by [fol. 44] the excess charges was collected from the consumers and, eventually and inevitably, is equitably due them; that this court has exclusive original jurisdiction of the determination of legality of the Federal Commission's order and the consequent exclusive ancillary jurisdiction of distribution of all such money as has accrued because of the stay in favor of the persons ultimately and equitably entitled thereto, and that all persons claiming any interest in such funds should be permitted and directed to come into the ancillary proceedings. It prays that the court retain jurisdiction for the purpose of making distribution, grant leave to the respondent to file proper pleading and restrain prosecution of all other actions.

The distributing companies, who purchase gas from petitioners and the latter's affiliate and who sell gas to the public agree that the refund should eventually, equitably and ultimately be made to the consumers who purchased from them. They contend that this court had exclusive jurisdiction of the original proceedings and has equally exclusive jurisdiction of the necessary ancillary proceedings to control, provide for and direct distribution of the refunds. Indeed the positions of petitioners, the Federal Power Commission, the Illinois Commerce Commission and the distributing companies are in substantial accord.

Marshall Joyce and others, claiming to be consumers, file a pleading which we shall designate as a cross-petition. They neither admit nor deny the jurisdiction of this court but aver that our authority, if any, is of such character that we are under no compulsion to exercise it and that

whether we should do so should be determined by our sound discretion "on the basis of the balance of convenience to both the court and parties and the comparative adequacy of remedy and relief available both on trial and on appeal." They have filed in the District Court a class suit in behalf of themselves and all other customers seeking recovery of excess charges, determination of the respective amounts due customers, distribution thereof, and restraint against all parties from proceeding in other courts. They have filed a similar action in the state court. They aver in each of their complaints that the excess charges constitute "a trust fund for the use and benefit of the gas consumers" and "money had and received to the use of the consumers" and insist that said sums shall be paid only to such persons.

Thus all parties before the court agree that the excess [fol. 45] charges when distributed should in equity be refunded to the ultimate consumers. The question immediately confronting us is whether this court has jurisdiction and if so whether we should or must retain it and restrain other litigation or, whether our power to act is discretionary and the parties should be remanded to relief in other forums.

The source and boundaries of our authority must be found in the Natural Gas Act, 15 U. S. C. A. Sec. 717R (b) (c), providing that persons aggrieved by an order of the Commission may obtain a review in the proper Circuit Court of Appeals, which shall have exclusive jurisdiction to affirm, modify or set aside the order in whole or in part, and the judgment of which shall be final, subject only to review by the Supreme Court. Proceeding for review does not, unless so specifically ordered by the court, operate as a stay of the Commission's order. Thus the Circuit Court of Appeals is the first forum in which a judicial hearing can be had to determine the legality of the order. In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board and various other administrative bodies. We have previously said in *Century Metalcraft Corporation v. Federal Trade Commission*, 112 F. (2d) 443 (C. C. A. 7) that under the Federal Trade Commission Act, Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment

whenever good cause is shown. This is in accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. *Butterick Co. v. Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2); *Silver Co. v. Federal Trade Commission*, 292 Fed. 752 (C. C. A. 6); *Chamber of Commerce v. Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8); *Federal Trade Commission v. Balme*, 23 F. (2d) 615 (C. C. A. 2), certiorari denied 277 U. S. 598; *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2).

[fol. 46] We are accustomed to thinking of the District Court as the only federal judicial tribunal of original jurisdiction, but we know of no constitutional prohibition against a grant by the Congress of original jurisdiction to the Circuit Court of Appeals. We are not concerned with the reason why Congress has in some instances vested in the District Court original jurisdiction to review orders of administrative bodies and why in others it has lodged such power in the Court of Appeals. The essential fact is that it has seen fit so to do. The rank of the court is not important. *Fed. Trade Comm. v. Balme*, 23 F. (2d) 615 (C. C. A. 2).

Having original jurisdiction, what is the nature of and the true limitation upon that jurisdiction? Is its exercise discretionary upon the part of this court or are we confronted with a duty? In considering this, we should remember the distinction between ancillary or incidental jurisdiction and that which is original. Where a court has jurisdiction of a cause of action and the parties, it has jurisdiction also of supplemental proceedings which are a continuation of or incidental to and ancillary to the former suit even though the court as a federal court might not have had jurisdiction of the parties involved in the ancillary proceeding if it were an original action. In other words, inasmuch as such jurisdiction is ancillary, a federal court is not precluded from exercising it over persons not

parties to the judgment sought to be enforced. 25 C. J. 696 and 697; 21 C. J. S., Sec. 88, page 136.

In *Labetter County Commissioners v. Moulton*, 112 U. S. 217 the court had entered judgment against a township upon bonds issued by the county commissioners in behalf of the township. Subsequently plaintiff sought a writ of mandamus to compel the commissioners to assess and collect a tax to satisfy the judgment. It was contended that the court, if it should act upon such a petition, would be exercising original jurisdiction and, under the particular facts, without jurisdiction. But the Supreme Court declined to accept this reasoning, saying: "It is quite true, as is familiar, that there is no original jurisdiction in the Circuit Courts in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow, because the jurisdiction in mandamus is ancillary merely, that it can not be exercised over persons not parties [fol. 47] to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which *Krippendorf v. Hyde*, 110 U. S. 276, is an example."

Where in the progress of a suit in the United States Court, property has been drawn into custody and control, third persons claiming interest in or liens upon the property may be permitted to come into court to protect and enforce their claims, even though the court could not have considered or adjudicated their claims if it had not originally impounded the property. *Hoffman v. McClelland*, 264 U. S. 552. There the court said at page 558: "Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary. *Oklahoma v. Texas*, 258 U. S. 574, 581; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632; *Krippendorf v. Hyde*, 110 U. S. 276, 281; *Compton v. Jesup*, 68 Fed. 263, 279; *Sioux City Co. v. Trust Co.*, 82 Fed. 124, 128; *Minot v. Mastin*, 95 Fed. 734, 739; Street Fed. Eq. Pr. pp. 1229, 1245-1247, 1364."

In a later case, *Central Union Trust Company v. Anderson County*, 268 U. S. 93, the Supreme Court said: "Ancillary suits are not limited to those initiated by persons

who desire to come in and have their rights determined. Such a suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy having relation to the property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit." Similar expressions are found in *Gunter v. Atlantic Coast Line*, 200 U. S. 273; *Blair v. City of Chicago*, 201 U. S. 400; *Wabash Railroad v. Adelbert College*, 208 U. S. 38.

This ancillary power to do complete justice as to all the parties' interests in a fund grows out of equity jurisdiction. When invoked we can conceive of no method by which it properly may be evaded. Thus the Supreme Court, discussing the jurisdiction of a statutory district court of three judges which had enjoined an order of the Interstate Commerce Commission, referring to the duty of the court to protect the impounded fund and direct its disposition, in *Inland Steel Co. v. U. S.*, 306 U. S. 153, said: "It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all, including the pub- [fol. 48] lic, whose interests the injunction may affect."

When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the court promptly to allocate the fund to its lawful owner." Similarly where the court had suspended the action of the Secretary of Agriculture and a fund had accumulated, in *U. S. v. Morgan*, 307 U. S. 183, the court said: "The district court sits as a court of equity, see *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373; *Inland Steel Co. v. United States*, 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

Here the fund has accumulated. Those charged with the duty of accounting for it, are ready and willing and offer to deposit it with the court. The fact that it is not yet physically in court does not alter the situation or affect the jurisdiction of the court, for this fund came into existence as a result of this court's stay order entered in the original proceeding. Two bonds were required to be filed,

conditioned for the payment of the money, a requirement made to protect the interests of all those whom our injunction affected. To all intents and purposes this involves the same jurisdiction as that over disposition of a fund actually in court; the jurisdiction of the court and its obligation and duty to act are the same. So in *Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, a bond had been filed. The city and its officials were representatives of the consumers who were the parties eventually concerned and the bond was conditioned for payment of the excess rate, in case it should be established that the enjoined rate was proper. The court, discussing the bond and the duty of the court with reference thereto, said: "And it recognized that to ascertain what should be due to them, to see to its collection from the company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause. To retain jurisdiction for the purpose of requiring that [fol. 49] restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate. * * * The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection." See also *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134; *In re City of Louisville*, 231 U. S. 639.

In *Ford Motor Company v. National Labor Relations Board*, 305 U. S. 364, the Supreme Court said: "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and with-

out intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceedings itself,—to secure a just result with a minimum of technical requirements.”

Thus we find the Supreme Court defining the court's obligation in cases similar to this as the duty of a court of equity to exercise jurisdiction to enforce restitution, and so far as possible, to correct what has been wrongfully done. *B. & O. R. R. Co. v. U. S. et al.*, 279 U. S. 781. More than one maxim of equity is applicable. Equity abhors circuity and multiplicity of actions. A court of equity taking jurisdiction for one purpose, will do complete equity between all interested persons. Such an obligation, imposed upon us as a court of original jurisdiction, can not, we think, with propriety, be avoided. Nor can we evade action by recourse to the suggestion that it is without our discretion to decline to act. The performance of duty is not discretionary; it is obligatory, mandatory.

Section 22 of the Natural Gas Act, 15 U. S. C. A. Sec. [fol. 50] 717 (u) affords, it seems to us, the only basis of argument, which causes us to pause. By this Section, the District Court is given “exclusive jurisdiction of violations of this chapter or the rule, regulations, and orders thereunder. * * *”. It is also given jurisdiction of suits or actions to enforce any liability or duty “created by, or to enjoin any violation of this chapter or any rule, regulation, * * *”.

The query arises, did Congress, by this section, vest the District Court with jurisdiction to direct the refund of rates which the Commission, or this court, on appeal, has declared to be excessive.

We have two sections conferring jurisdiction upon the Federal court, included in the Act. The one, just referred to, gives certain jurisdiction to the District Court. It is general and quite inclusive; it does not deal specifically with the return of excessive rates.

Another section deals specifically with the subject of rates and charges. It makes the Commission the rate determining, rate regulating body. That body is given express power to determine what is a just and reasonable rate, and to fix the same by order. The gas company, however, is given authority to appeal from the Commission's holding

to the United States Circuit Court of Appeals, which is given *exclusive* jurisdiction to affirm, modify, or set aside, the order, in whole, or in part. Provision is made for a hearing before that court, and it is provided that if the finding of the Commission be supported by substantial evidence, it shall be conclusive.

In other words, we find here provision for separate, exclusive jurisdictions of the District Court and of the Circuit Courts of Appeals. In each instance, it should be noted that the jurisdiction conferred is exclusive. The scope of the exclusive jurisdiction of the Circuit Court of Appeals is specific and covers appeals, which includes rate cases.

The rule of construction, *generalia specialibus non derogant* at once suggests itself. If the Circuit Court of Appeals has exclusive jurisdiction in the rate case and has power to affirm, modify, or reverse, the conclusion seems unavoidable that it necessarily also has not only the power, but the duty, to make interim staying orders, etc., require bonds, and perform the necessary acts to effectuate the orders made as a part of its jurisdiction.

We have, in the exercise of our conferred power, caused [fol. 51] a fund to accumulate, and as a court of equity, are charged with the duty of doing complete justice. We find nothing in the Act indicating an intent upon the part of Congress to relieve us of the responsibility it has seen fit to impose upon us.

It follows that responsibility for proper disposition of all excess charges is, under the original jurisdiction of this court and its ancillary powers as a court of equity, mandatory upon us; it is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made. It follows that all parties should be restrained from proceeding in other courts.

Since the conference in which the court and the interested parties participated and at which the Illinois Commerce Commission presented, through the Attorney-General of Illinois, its formal appearance and brief in support of our exclusive jurisdiction to act in the premises, we have received from the Commission, by its Chairman, a letter suggesting that authority to superintend and complete restitution is lodged in the Commission. However, in view of the absence of express provision of the Illinois Statutes to such effect and of machinery in the Commission to accom-

plish such refunding, and in further view of our conclusions as to the nature of our jurisdiction, we are not persuaded that the suggestion is legally correct or that it is of such practical effect as to justify us in shifting our duty and responsibility to the Commission.

All questions as to intervention shall be reserved for further action by this court. Likewise all other questions arising out of the petitioners' request of this court that it retain jurisdiction are reserved for further study and order. We are at this time meeting and determining the question of our jurisdiction upon the affirmative determination of which our future action is dependent. Counsel for petitioners will present an order enjoining all parties from proceeding in any other jurisdiction.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.

vs.

FEDERAL POWER COMMISSION

ORDER THAT COUNSEL PRESENT FORM OF JUDGMENT—May 22,
1942

Pursuant to the opinion of this Court filed this day, It is ordered by the Court that counsel for petitioners present to the Court for approval a form of order enjoining all parties from proceeding in any other jurisdiction in this matter.

[fol. 53] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 7454

NATURAL GAS COMPANY OF AMERICA and TEXOMA NATURAL
GAS COMPANY, Petitioners

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

STATEMENT OF NATURAL GAS PIPELINE COMPANY OF AMERICA
and TEXOMA NATURAL GAS COMPANY RE: ITS INTEREST IN
REFUND—Filed June 18, 1942

Pursuant to request by the Court, of which I am advised
by letter from the Honorable Kenneth J. Carrick dated May
26, 1942, I disavow and disclaim any interest in and to the
moneys which Natural Gas Pipeline Company of America
and Texoma Natural Gas Company must refund as directed
by the order of the Federal Power Commission.

(S.) S. A. L. Morgan, Attorney for Petitioners, Nat-
ural Gas Pipeline Company of America and Texoma
Natural Gas Company.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF THE FEDERAL POWER COMMISSION RE: ITS IN-
TEREST IN REFUND—Filed June 18, 1942

Federal Power Commission

Washington

Natural Gas Pipeline Company of
America, et al. vs. Federal Power
Commission, et al., C. C. A. 7—No. 7454.

June 4, 1942.

[fol. 54] Honorable Kenneth J. Carriek, Clerk, United States Circuit Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois.

DEAR SIR:

This will acknowledge receipt of a document in the above entitled matter, dated May 26, 1942, the text of which reads as follows:

"I have been requested by the court to ask you to sign a document disavowing or disclaiming any interest in or to the moneys which the Natural Gas Pipeline Company and Texoma Natural Gas Company must refund, as directed by the order of the Federal Power Commission."

Please be advised that this Commission does not have any financial interest in or to the moneys referred to, but is, of course, interested in the ultimate disposition of such funds.

Very truly yours, (S.) Leon M. Fuguey, Secretary.

[File endorsement omitted.]

[fol. 55] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

STATEMENT OF CHICAGO DISTRICT PIPELINE COMPANY, THE
PEOPLES GAS LIGHT AND COKE COMPANY, PUBLIC SERVICE
COMPANY OF NORTHERN ILLINOIS, WESTERN UNITED GAS
AND ELECTRIC COMPANY AND ILLINOIS NORTHERN UTILITIES
COMPANY, SETTING FORTH THEIR POSITION WITH RESPECT TO
THE FUND UNDER THE JURISDICTION OF THE COURT—Filed
June 18, 1942.

Under the circumstances of this case, it is the position of the undersigned companies, as stated by them in open court on May 6, 1942, that they do not now claim and never have claimed any part of the fund; that at all times it has

been and is now their position that the fund belongs to and is the property of the ultimate gas consumers who during the period covered by the accumulation of the fund have paid their bills at the rates then in effect; that these companies are in accord with the position taken by the Federal Power Commission and the Illinois Commerce Commission, respectively, to the effect that the fund belongs and should be distributed to the ultimate consumers and [fol. 55a] not to these companies; that this formal statement of position is filed in order that the Court can proceed in an orderly and expeditious manner with the distribution of the fund; that these companies are ready and willing at all times to assist the Court in working out such orderly and expeditious procedure; and that this statement of position is made knowing that the Court, in the exercise of its equitable powers, is able to and will protect these companies against loss or liability of any nature or character by reason of the existence or disposition of the fund.

Chicago District Pipeline Company, The Peoples Gas Light and Coke Company. By Daily Dines White & Fiedler Sidley, McPherson, Austin & Burgess, Their attorneys. Public Service Company of Northern Illinois, Illinois Northern Utilities Company. By Isham, Lincoln & Beale, Their attorneys. Western United Gas and Electric Company, By Alschuler, Putnam, Johnson & Ruddy, Its attorneys.

June 2, 1942.

[fol. 56] [File endorsement omitted]

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF ILLINOIS COMMERCE COMMISSION RE: ITS INTEREST IN REFUND—Filed June 18, 1942

June 1, 1942.

No. 7454

IN RE NATURAL GAS PIPELINE COMPANY OF AMERICA and
TEXOMA NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

Judge EVAN A. EVANS, Judge WILLIAM M. SPARKS, Judge
OTTO KERNER, Circuit Court of Appeals, 1212 North Lake
Shore Drive, Chicago, Illinois.

DEAR JUDGE:

Pursuant to your communication dated May 26, 1942, concerning the matter of disavowing or disclaiming interest in or to the moneys which the petitioners must refund, the members of the Illinois Commerce Commission state their considered judgment as follows:

As a statutory branch of the State Government, the Commission find themselves unable to disavow or disclaim any interest in or to the moneys involved. The members of this Commission as such have no interest in or to said moneys. However, this Commission must take cognizance of the fact that in the distribution of refunds of the Illinois Bell Telephone Company upon completion of the distribution to the patrons of the said company, a substantial sum of money remained of which distribution could not be made due to inability to locate the proper parties. In that case the State of Illinois was reimbursed out of the money so remaining for the expenses incurred by the Illinois Commerce Commission in the prosecution of the litigation which established the fund. We are, therefore, of the opinion that should there be moneys available for distribution, the rightful recipients of which cannot be found, then the State of Illinois should be reimbursed for expenditures incurred in the investigation and litigation preliminary to the establishment of the fund now available for distribution.

Yours very truly, Illinois Commerce Commission,
John D. Biggs, Chairman.

[File endorsement omitted.]

[fol. 61] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

ORDER RETAINING JURISDICTION OF REFUNDS PAYABLE AND
ENJOINING PROCEEDINGS ELSEWHERE—JUNE 24, 1942

On this 24th day of June, 1942, upon petition of Natural Gas Pipeline Company of America and Texoma Natural Gas Company for order retaining jurisdiction to direct the disposition of the funds payable because of the stay order, and upon petition of Marshall Joyce, et al. filed in connection therewith, and upon the answer of Illinois Commerce Commission thereto; the court having on May 6, 1942, conducted a conference at which said original petitioners, Federal Power Commission, Illinois Commerce Commission, Marshall Joyce, et al., Chicago District Pipeline Company, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois, Illinois Northern Utilities Company and Western United Gas and Electric Company appeared [fols. 62-63] by their attorneys; and the court having considered memorandum filed on behalf of all said persons, other than Federal Power Commission; and the court having filed herein on May 22, 1942, its opinion finding that it has sole and exclusive jurisdiction over the disposition of the excess charges collected by Natural Gas Pipeline Company of America and Texoma Natural Gas Company commencing September 1, 1940 and ending March 31, 1942, during which period the order of the Federal Power Commission dated July 23, 1940, was stayed by this court;

Ordered, Adjudged and Decreed:

First. This court has and reserves sole and exclusive jurisdiction over the disposition of the funds represented by the said excess charges collected by Natural Gas Pipeline Company of America and Texoma Natural Gas Company, and over all obligations of the said companies in respect thereto.

Second. Marshall Joyce and all co-plaintiffs named in their cross-petition filed herein, and all other persons, firms or corporations, be and they hereby are enjoined from instituting, maintaining or prosecuting any suit, action or proceeding in any other court or jurisdiction, against Natural Gas Pipeline Company of America, Texoma Natural Gas Company, Chicago District Pipeline Company, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois, Illinois Northern Utilities Company, Western United Gas & Electric Company, or any of them, or against any other persons, firms or corporations similarly situated with respect to the subject matter of this proceeding, to recover from any of them all or any part of the funds representing the said excess charges.

(Sgd.) Evan A. Evans, William M. Sparks, Otto Kerner, United States Circuit Judges.

[fols. 64-65] IN THE UNITED STATES CIRCUIT COURT OF
APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

ORDER APPOINTING AGENT TO SUPERVISE FUNDS—June 24,
1942

This court having retained jurisdiction of this cause, upon remand by the United States Supreme Court, for the purpose of distribution of the refund found to be due.

It Is Hereby Ordered, That Attorney Tappan Gregory, be, and he is hereby, named, as the court's appointee and agent to effect and supervise the distribution of said refund.

(Sgd.) Evan A. Evans, William M. Sparks, Otto Kerner.

June 24, 1942.

[fols. 66-67] IN THE UNITED STATES CIRCUIT COURT OF
APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

STATEMENT RE INTEREST IN REFUND—Filed June 25, 1942

Comes now United Gas Service Company, a corporation, and for the sole purpose of stating its position as regards the fund that shall be paid into court by the petitioners by way of refund, and state as follows:

United Gas Service Company disclaims any part of said fund and asserts that same belongs to and is the property of the ultimate gas consumers who, during the period covered by the accumulation of the fund, have paid their bills at the rates then in effect.

This statement is made to the end that said fund, so far as United Gas Service Company is concerned, may be distributed under such orders as may be promulgated by the court in the exercise of its equitable powers.

It is understood that United Gas Service Company will be subject to no liability or expense in effecting any such distribution.

Dated this 13th day of June, 1942.

United Gas Service Company, by (Name illegible),
President. Rowland, Talbott & Rowland, Attor-
neys, by L. A. Rowland.

[File endorsement omitted.]

[fol. 68] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

ORDER RE: INTEREST AND COSTS—June 26, 1942

The petition of Natural Gas Pipeline Company et al., coming on to be heard, and upon all the proceedings had in this court in the above-entitled cause,

It is ordered that the said Natural Gas Pipeline Company of America and Texoma Natural Gas Company pay to the Clerk of this Court the sums due under the order of the Federal Power Commission, heretofore made and approved by the Supreme Court of the United States, on the sixteenth day of March, 1942, together with interest at 2% per annum. All sums collected by the petitioners in excess of the amounts which, under the order of the Federal Power Commission, they should have charged, shall draw interest at 2% from the date such amounts were improperly collected from the utilities.

[fols. 69-70] It is further ordered that said sums should be paid within ten days of the date hereof and if not paid at that time all said sums shall draw interest at 5%.

It is further ordered that, in making payments and computing the interest, said petitioners shall submit to Tappan S. Gregory, the officer of this court who shall approve the final calculation.

It is further ordered that this order shall in no way exclude the court from proceeding in any other manner to enforce payment from petitioners to the parties entitled thereto.

It is further ordered that the petitioners are not chargeable with and need not pay any expense for distributing said refund among the parties ultimately found to be entitled thereto.

It is further ordered that upon the payment of this sum, liability under the bond heretofore given, as well

as any other liability arising out of the overcharges made by petitioners to the public utilities with whom they contracted, are satisfied and discharged.

Evan A. Evans, Otto Kerner.

June 26, 1942.

[fol. 71] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

MEMORANDUM ON INTEREST AND COSTS—Filed June 26, 1942

Before EVANS and KERNER, Circuit Judges.

The court has had under consideration the distribution of the funds which the petitioners must pay pursuant to the order of the Federal Power Commission, approved by the Supreme Court on the sixteenth of March, 1942. Among other questions there are two which relate to, or bear upon, the amount which petitioners should pay. The principal sum is not in question but there is a dispute over the requirement of interest upon the sums due from the petitioner as well as the expenses incident to distributing the refund among consumers or other parties, which the court may find are entitled to receive said refund.

Our guide is the case of *United States v. Morgan*, 307 U. S. 183. We have jurisdiction of the fund, and are compelled to see to its distribution. In ascertaining what the order should be, as well as the costs of distributing this amount, we are directed by this case to apply equitable principles and to produce and accomplish results which are fair and equitable.

[fol. 72] In reaching the conclusion as to interest, we are impressed by the argument that the Commission ordered the petitioners to reduce the charges they were making to the utilities by the sum of \$3,750,000 per annum. Peti-

tioners failed to comply with that order but wished to review it in the courts. They failed to get a modification or change in said order in the courts, although their proceedings were admittedly in good faith and not for the sake of delay or for the use of moneys which they were collecting under the old rates. It is our opinion that under the circumstances they must be chargeable with interest from the dates they received the moneys and upon the amounts they received in excess of the order made by the Power Commission.

Guided by the requirement that our action should reflect justice and equity, we think a fair rate of interest under the circumstances, considering the times, is 2%.

Under the facts in this case, we are unable to say that the petitioners should be charged with the expenses of the distribution. They did not deal with the consumers, although the gas they sold was known by them to be for the consumers who would ultimately pay the bill for it. The public utility was merely a conduit whereby the natural gas, mixed with other gas, was to be delivered to the consumers, who were to pay a price therefor, fixed by the utilities, after approval by the Illinois Commerce Commission. Under all the circumstances we do not believe that it would be equitable or just to require the petitioners to pay any of the expenses incident to the distribution of said fund.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF CENTRAL STATES ELECTRIC COMPANY RE: ITS
INTEREST IN REFUND—Filed June 30, 1942

June 29, 1942.

Mr. Kenneth J. Carrick, Clerk, United States Circuit Court
of Appeals, 1212 Lake Shore Drive, Chicago, Illinois.

DEAR SIR:

This letter is being written in response to your inquiry dated June 11 pertaining to the fund in the possession of the Court in connection with the Natural Gas Pipeline Company of America matter. The refund of \$25,325.46 mentioned in your communication arises under the original contract between Natural Gas Pipeline Company of America and Cen-

tral States Electric Company. More than 80% of the gas received under that contract is taken by the Iowa Electric Company at the Pipeline Company's contract rates for distribution in the city of Muscatine, Iowa, and the Iowa Electric Company pays the Pipeline Company directly for such gas. The balance of the gas is used by Central States Electric Company for local residential and commercial distribution in three small Iowa towns which have no industrial gas consumption.

At the time Iowa Electric Company purchased the gas manufacturing plant and distribution system in Muscatine in 1928, manufactured gas of 525 b. t. u. heating value was being distributed. However, in 1932, when the pipeline was extended from Texas to Chicago, its close proximity to Muscatine and the promotional efforts of the Pipeline Company resulted in the introduction of natural gas to replace manufactured gas. According to a survey prepared by the Pipeline Company, it was asserted that natural gas could be substituted for manufactured gas, on a suggested experimental rate, competitive with other fuels, which would result in approximately the same net earnings. It was further contended that the loss in gross revenue resulting from the higher BTU content of natural gas could be offset by addition of house heating customers and by other new gas sales possibilities. Accordingly, a lateral extension from the main pipeline to Muscatine was made in 1932.

Results from a net revenue standpoint were discouraging from the beginning. It was found that house heating and other new types of gas use were impractical under the Pipeline Company's wholesale rate, and by the winter of 1933, it became evident that something must be done if operations were to produce any net return. Figures were then available to show a wide discrepancy between actual expenses and the figures forecast by the Pipeline Company; there were many contributing factors, such as an unexpectedly high leakage caused by introducing dry natural gas into a distribution system previously used for a gas of very different characteristics.

Early in 1934, after insistent demands by Iowa Electric Company, the Pipeline Company made a voluminous report tending to substantiate their original forecast, but even from that report, it was still obvious that the Company must have some relief. Previously a "50-cent Gas Sales [fol. 74] Contract" had been signed which was supposed to

reduce the cost of gas, but it developed that this contract was of only minor benefit, and in November of 1934, a method of computing and charging for demand under the 50-cent contract was changed and the "Supplemental Gas Sales Contract" was amended to reduce the rate for industrial gas from 12.5 cents per HCF to 10.5 cents per MCF.

During this same year, Company engineers investigated many methods and suggestions for reducing the Muscatine operating costs, even to the extent of considering the manufacture of 1000 BTU water gas in an effort to control the amount of the demand charge under the contract with the Pipeline Company. Nothing was accomplished, as there were not enough industrial consumers who could use any worthwhile quantities of dump (6c) gas to justify investment in demand controlling equipment. The fact is that the "demand charge-commodity charge" type of rate is suitable for industrial areas such as Chicago, the Tri-Cities, and other large centers, but is not a rate that can be economically used by an ordinary gas company whose outlets for dump (6c) gas are extremely limited. The little relief obtained under the contract modifications referred to above was wiped out in the late summer of 1937 when the Pipeline Company compelled the conversion of the majority of the industrial accounts that were purchasing gas under the 10.5 cent rate to a processing rate of 15.5 cents. At that time the Pipeline Company also took the position that dump (6c) gas could not be sold to processing account customers, and this ruling further curtailed the outlets for dump (6c) gas. Also the price of processing gas was increased from 15.5 cents to 16.5 cents at the beginning of 1939.

Through all these years of negotiation, the Pipeline Company has admitted the plight of its less metropolitan utility customers and encouraged the hope that more appropriate rate schedules would be forthcoming. This has been true in recent years, especially since the investigation by the Federal Power Commission and during the litigation which followed the order of the Commission. For example, in response to a letter on the matter in March 1941, a reply was received: " . . . it is my own personal opinion that our new rate structure will be altered sometime in the very near future . . . as soon as we have a definite rate to discuss. I intend to come to Cedar Rapids and go over it with you and your organization in detail. . . . I hope also that the rate will be such as to make house heating more at-

tractive for those properties presently served with natural gas." We are still awaiting such a rate schedule, which will result in a lower gas cost and will not penalize so severely the lack of outlets for dump (6¢) gas.

In Iowa, there being no public service commission, the power to fix utility rates is vested in the councils of the various cities and towns. A finding by your Court that the individual local consumers are entitled to the refund would be a retroactive determination, without a hearing, that Central States Electric Company and Iowa Electric Company, the distributing companies, have been earning an adequate return (which was not the case), or that the rates charged to the individual local consumers are excessive, although no demand or complaint to that effect has been made in this territory. The fact that the charges by the Pipeline Company have been found to be excessive is not proof that the rates charged the individual local consumers by the distributing companies are likewise excessive. Such a determination, which would result in fixing rates for the future, should only be made after a full and complete hearing in a proper jurisdiction.

I believe you will be interested in a brief resume of the nine full years of operation in Muscatine. The average yearly revenue during this period amounted to \$109,790.32, and the average annual expenses, including taxes, amounted to \$81,567.96, leaving an average balance of \$28,222.36 before proper depreciation and adequate return on investment, averaging \$44,934.24 annually. Thus the average yearly loss has been \$16,711.88. The new rate schedule ordered by the Federal Power Commission affords considerable relief, but does not quite cover adequate return and depreciation and, of course, does nothing to compensate for past losses sustained. We feel, therefore, that Iowa Electric Company and Central States Electric Company are entitled to any refunds that may be due within the power of the Court, and upon payment of the refund to Central States Electric Company, as the contracting company, a proper pro rata part thereof will be passed on to the Iowa Electric Company as subpurchaser under the original contract.

Very truly yours, (S.) Frank A. Fratcher, General Manager.

Frank A. Fratcher/R.

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, and ILLINOIS COMMERCE COM-
MISSION, Respondents

MEMORANDUM ON METHODS OF MAKING REFUNDS TO CUS-
TOMERS OF THE PEOPLES GAS LIGHT AND COKE COMPANY—
Filed June 30, 1942.

Before EVANS and KERNER, Circuit Judges.

The first problem is to determine the net amount of the refund. To do this, it will be necessary to determine whether or not there is liability for income or excess profits taxes, and, if so, in what amount. It will also be necessary to anticipate with such accuracy as may be possible the cost of making the refund and any other expenses properly chargeable against the fund. The cost of making the refund, will depend upon the method employed. If one of the simple, short-cut methods herein-after outlined can be followed, this cost would be but a small fraction of that which would be entailed in carrying out a fully elaborated method of arriving at the amounts to be refunded.

Two short-cut and practical methods of making this refund are as follows:

(a) The utility companies would furnish the figures from which the percentage which the sum to be refunded bears to the total amount charged to their customers would be determined. A list of the names and addresses of all such customers must be obtained and the refund mailed to them or credited on such customers' current bills. The [fol. 78] cost of carrying out the utilities' part in this method and the cost of sending refund checks to some 850,000 consumers of The Peoples Company would involve an additional expense. The total has been estimated at \$25,000.

(b) An even less expensive method would be to have the company make the refund in its entirety by making a

percentage deduction from the amount of the customers' gas bills for some selected future month or months, and crediting the amount of the refund against the amounts due to the company from the customer. If this method could be used all cost of making and mailing checks would be avoided, and the cost of carrying out the Company's part of making the refund on this basis would not exceed \$50,000.

It may be found that a distribution under method (a) would establish the most favorable possible basis for the necessary closing agreement with the Commissioner of Internal Revenue. It would relieve the Peoples Company of any possible liability for income and excess profits taxes in connection with the fund. We are thoroughly satisfied that there is no liability of any of the utilities for Federal income tax where this money is paid to the consumer. We also are convinced that there would be no liability of any utility that received the money from petitioners and paid the sum to its customers in the same year it was received. We are also well satisfied, that if the sum were paid by petitioners to the utilities and any one of the utilities should hold such payments, or take action which asserted ownership thereof, then said utility or utilities would be subject to a Federal income tax.

[fol. 79] (c) Another alternative method of making the refund would contemplate the recomputing of all bills actually rendered during the twenty or more month period in which the fund was accumulated, and the payment to each customer of a sum computed on the basis of bills rendered before discount for prompt payment, etc. This method, while more exact theoretically, would nevertheless involve many assumptions, and would perhaps create more problems than it would solve. The cost of making the refund to the Peoples Company's customers on this basis would be out of all proportion to the cost of either of the short-cut methods described above, probably falling somewhere between \$350,000 and \$500,000. The difference in cost would be so great that it is quite possible that in every instance the consumer would actually receive a larger refund under one of the more simplified methods (a) or (b). It should also be noted that by using one of the short-cut methods the time employed in making the refund would certainly be shortened.

Even if the labor could be obtained to carry out plan (c), we hold it should not be adopted. Whether plan (a) or plan (b) be adopted will depend on the report of our specially appointed official, Mr. Tappan Gregory, who is directed to investigate and report to us on the merits and practicability of both plans.

[fol. 80] Before we can determine the total amount to be refunded to the customers, we must be informed on the cost of distribution. Two substantial items are Clerk's fees of 1% of the fund (this is fixed by statute and goes to the U. S. Government ultimately, though collected by the Clerk) and postage of either 2 cents or 3 cents depending on where the customer lives. A third item is the cost of the services (labor mostly) of making checks and computing the amount of refund. The number of customers is estimated at over 850,000.

On this matter, too, we direct Mr. Gregory, as officer of this court, to investigate and report, and at an early date, what he estimates said cost will be.

Associated with this problem of costs, one utility serving Nebraska City asks that the refund go to it and not to its customers. That it and others may know and plan accordingly, we express our conclusion, and our holding, which is *all refunds which petitioners must make, belong to the consumers*, for whose benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities. The price paid by the utilities was fixed by contract. It, together with cost of services and interest, etc., was what made up the utilities' bill to their consumers. These rates or charges were approved by the Illinois Commerce Commission. The proceedings which were instituted by Federal Power Commission and furthered by the Illinois Commerce Commission to reduce the natural gas cost to the [fol. 81] utilities were for the benefit of the consumers. They so declare. Most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them. An exception is the Nebraska City utility, which believes it is the beneficiary of a windfall, to which it intends to hold on, if once it can get possession of it. It entertains the old and out-moded conception

of utility magnates and utility counsel which overlooked the trustee status of a public utility, whose excuse for existence is service to the public to whom it owes the duty to diligently endeavor to render ever better service at lower rates, as well as to earn a fair return on the capital invested in it. In fact it was the position of counsel for the Pipeline Company in the U. S. Supreme Court that under no circumstances could the utility claim any refund and that if anyone was entitled to the refund, it would be the consumers.

A public utility located in Nebraska City and another located in Iowa held contracts with petitioners. As between the two contracting parties, their contract would be binding, but the business of the petitioners was subject to regulation by the Federal Power Commission and also in part by the Illinois Commerce Commission. These two bodies sought to reduce charges to the consumers. As between petitioners and utilities they were not interested, but these boards were interested in reducing charges to the consumers. For the consumers the Federal Power Commission acted. Petitioners so understood the nature of the contract and defended on the ground that they had no contract with these consumers and owed nothing to them as consumers,—nor were they subject to Federal regulation for the consumers' benefit. Nebraska City and all other utilities stood by and accepted the situation as it was [fols. 82-83] tendered by the pleadings and the parties. Now one or two of these utilities located where no state supervisory commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome if they were to succeed. With their efforts in this respect, we have no sympathy.

The court will make an order on this finding that the money refunded by petitioners belongs to the consumers and none belongs to the utility or utilities.

June 30, 1942.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

ORDER DESIGNATING BANKS, ETC.—July 1, 1942

Before Evans and Kerner, Circuit Judges.

Petitioners having deposited with the Clerk of this Court the amount which they claim to be due under the ruling of the Federal Power Commission, heretofore upheld by the United States Supreme Court, and the Court being desirous of distributing the deposit of said money among several banks instead of depositing it all in one bank and also fixing the date when the interest on the refunds at 2% thereon shall cease,

It is ordered that the following banks in Chicago be and they are selected as banks in which the money shall be deposited until the amounts due the consumers can be determined and checks drawn to the consumers for the amounts deposited.

Continental Illinois National Bank and Trust Company of Chicago, 230 S. Clark St.

First National Bank of Chicago, 38 S. Dearborn St.

Harris Trust & Savings Bank, 115 W. Monroe St.

American National Bank and Trust Company of Chicago, 33 N. LaSalle St.

Northern Trust Company, LaSalle & Monroe St.

City National Bank & Trust Co., 208 S. LaSalle St.

[fol. 85] It is further ordered that upon receipt of said money the Clerk deposit the same as follows:

\$1,100,000 in the First National Bank of Chicago;

\$1,100,000 in the Northern Trust Company of Chicago;

\$1,000,000 in the City National Bank & Trust Co.;

\$1,000,000 in the Harris Trust & Savings Bank;

\$1,000,000 in the American National Bank and Trust Company of Chicago; and

\$1,177,913.52 in the Continental Illinois National Bank and Trust Company of Chicago.

It is further ordered that the interest at 2% on the refunds which the petitioners must pay, shall be figured to April 10, 1942, the date when petitioner sought leave to deposit the money in court.

July 1, 1942.

[fol. 86] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

STATEMENT OF IOWA-ILLINOIS GAS AND ELECTRIC COMPANY RE/
ITS INTEREST IN REFUND—Filed July 2, 1942

Iowa-Illinois Gas and Electric Company states that it makes no claim to any part of the fund deposited or to be deposited in court in the above-named proceedings as repayment of sums collected subsequent to July 23, 1940, in excess of rates fixed by the Federal Power Commission in its order of that date for natural gas sold by Natural Gas Pipeline Company of America to its wholesale customers, including Iowa-Illinois Gas and Electric Company and its predecessor companies, Cedar Rapids Gas Company, Iowa City Light and Power Company, Ottumwa Gas Company, Peoples Light Company and Peoples Power Company. Iowa-Illinois Gas and Electric Company understands that the Court will, in the course of these proceedings, (1) provide for the equitable distribution of an aliquot portion of the fund to the retail customers of Iowa-Illinois Gas and Electric Company and its predecessor companies who, during the period in which the fund accumulated, purchased gas from Iowa-Illinois Gas and Electric Company and its predecessors, and (2) protect this Company against any expense which may be incurred in the administration of the

refund to the customers of this Company, as well as against [fol. 87] any liability with respect to income taxes on account of the refund.

Iowa-Illinois Gas and Electric Company, (Signed)
by Thos. K. Humphrey, Its Attorney.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

STATEMENT OF IOWA-NEBRASKA LIGHT AND POWER COMPANY
RE ITS INTEREST IN REFUND—Filed July 3, 1942

Iowa-Nebraska Light and Power Company states that it makes no claim to any part of the fund deposited or to be deposited in court in the above-named proceedings as repayment of sums collected subsequent to July 23, 1940, in excess of rates fixed by the Federal Power Commission in its order of that date for natural gas sold by Natural Gas Pipeline Company of America to its wholesale customers, including Iowa-Nebraska Light and Power Company. Iowa-Nebraska Light and Power Company understands that the Court will, in the course of these proceedings, (1) provide for the equitable distribution of an aliquot portion of the fund to the retail customers of Iowa-Nebraska Light and Power Company who, during the period in which the fund accumulated, purchased gas from Iowa-Nebraska Light and Power Company, and (2) protect this Company against any expense which may be incurred in the administration of the refund to the customers of this Company, as well as against any liability with respect to income taxes on account of the refund.

[fol. 87a] Iowa-Nebraska Light and Power Company, (Signed) by Geo. A. Lee & Lee & Sheldahl.

[File endorsement omitted.]

[fol. 88] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1941

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE—
Filed September 3, 1942

Before Evans, Sparks, and Kerner, Circuit Judges.

This case now comes before the court for the entry of a decree determining the ownership of the moneys heretofore paid to the clerk of this court by Natural Gas Pipeline Company of America, pursuant to an earlier order of this court, and for a determination, and for an order of disposition, of such funds, as well as the method of such disposition.

The court finds: (1) that the moneys, amounting to \$6,377,913.52, less the Clerk's statutory fees of one percent and costs and expenses of distribution, belonging to the eligible ultimate consumers of the several utilities involved and should be so distributed; that none of the utilities is entitled to such funds.

(2) The court further finds that both the Federal Power Commission and the Illinois Commerce Commission have [fol. 89] taken the position that the funds should be distributed among the ultimate consumers of the gas, for whose benefit these proceedings were instituted.

(3) The court finds the amounts stated in the order of the Federal Power Commission, with interest thereon, and less deductions for expenses of distribution and clerk's fees, are the respective sums due the customers entitled to the

refunds. The following is a specific statement of the amounts of principal and interest.

Name	Amount Stated in Order of Federal Power Commission	Interest	Total
Chicago District Pipeline Company	\$5,823,577.62	\$88,056.18	\$5,911,633.80
Cedar Rapids Gas Company *	99,693.18	1,462.23	101,155.41
Central States Electric Company..	25,325.46	383.08	25,708.54
City of Nebraska City.....	23,622.03	369.20	23,991.23
Iowa City Light and Power Com- pany *	31,638.60	476.52	32,115.12
Iowa-Nebraska Light and Power Company	19,026.90	283.25	19,310.15
Iowa Power & Light Company....	7,812.45	120.85	7,933.30
Illinois Northern Utilities Company	7,158.78	13.56	7,172.34
Kewanee Public Service Company..	9,291.70	79.40	9,371.10
Ottumwa Gas Company *	24,635.34	375.26	25,010.60
Peoples Light Company *	101,527.83	1,518.78	103,046.61
Peoples Power Company *	107,082.81	1,583.11	108,665.92
Princeton Gas Service Company..	659.50	1.47	660.97
United Gas Service Company.....	2,097.66	40.77	2,138.43
Totals	\$6,283,149.86	\$94,763.66	\$6,377,913.52

* New Iowa-Illinois Gas & Electric Company.

The above allocation is subject to the rule as to "qualified communities" hereinafter stated. In the case of Chicago District Pipeline Company, the natural gas which it purchased from Natural Gas Pipeline Company of America was resold to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois, Western United Gas and Electric Company and Northern Indiana Public Service Company; and it is to the eligible customers of these four last-named utilities that the refunds should be made. The total amount of excess charges paid by Chicago District Pipeline Company, as found by the Federal Power Commission in its order of April 23, 1942, was \$5,823,577.62, exclusive of interest. This sum, together with interest thereon, after the deductions above mentioned, should be divided among the eligible customers of [fol. 90] the four utilities purchasing gas from Chicago District Pipeline Company on the basis of the contractual relations between the several companies involved. Such divisions, before such deductions, would be as follows:

Name	Amount Before Interest	Interest	Total
The Peoples Gas Light and Coke Company	\$4,077,428.74	\$61,653.33	\$4,139,082.07
Public Service Company of Northern Illinois	1,230,403.45	18,604.47	1,249,007.92
Western United Gas and Electric Company	453,822.84	6,862.08	460,684.92
Northern Indiana Public Service Company	61,922.59	936.30	62,858.89
Total	<u>\$5,823,577.62</u>	<u>\$88,056.18</u>	<u>\$5,911,633.80</u>

The above allocation is likewise subject to the rule as to "qualified communities" hereinafter stated.

(4) The court further finds, as to the customers eligible to receive refunds and the method of payment to each customer, as follows, to-wit: It is commonly recognized with respect to utility charges, that certain rates are established on a basis which meets competitive conditions in a particular field, rather than on a basis related solely to the costs of providing the particular service. Rates established for the sale of gas for industrial use and home heating are the principal rates of this character. The charges are determined in the light of the cost of some competing commodity or service, and are, or may be, lower than rates charged for other classes of gas sales. The wide differences between these rates are known to, and have the approval of, regulatory commissions. Moreover, heating and industrial gas sales represent "large volume" uses, for which the cost per unit is lower than where sales are made in smaller volume to large numbers of customers. In consequence, the court deems it equitable to eliminate, so far as practicable, gas sold for industrial and house heating uses from the basis of the refund. Gas sold at rates available solely to industrial customers is not to be provided for in determining those eligible to the refund. Similarly, gas for heating uses, will be largely excluded in determining such eligible customers.

Natural gas is sometimes distributed to ultimate consumers and sometimes is used as a constituent element in a mixture of gas which is distributed to the ultimate consumers. Provision should be made so that this condition will not have the effect of producing inequitable results as among consumers. It would manifestly be inequitable to accord identical treatment to all gas customers

of a particular utility if, in one community, the natural gas was distributed, as such, or formed a large portion of the mixed gas, whereas in another community the natural gas was only a small component part of the gas supply. Precise accuracy in this matter cannot be achieved. We have concluded, and rule, that gas customers entitled to refunds hereunder shall include only those receiving gas service during the refund period in communities (including rural areas) in which at least 12½% of the gas supplied by the utility was derived directly or indirectly, from Natural Gas Pipeline Company. Such communities are referred to as "qualified communities." In the application of this rule, moneys allocable to the customers of a given utility as a group will be distributed only among those of the eligible customers who received service from that utility in qualified communities.

In arriving at a method of effecting the refunds, the court utilizes the generally known fact that the billing operations of any sizeable gas utility are conducted on a "cycle" basis, such that meter readings are made for varying portions of the utility's customers at varying periods of the month, and that because of the practice of "cycle" billing, it is not necessary that billings of an exact calendar month be used, since the same cyclical result may be obtained by starting with any billing unit in the standard cycle and continuing until a full cycle has been completed.

It is therefore ordered and decreed, That

1. The fund, including interest, aggregating \$6,377,913.52, less all fees, costs, and expenses of distribution, belongs to and is the property of the eligible customers and does not belong to the utilities named in the next paragraph of this decree or to Chicago District Pipeline Company.

2. The fund, after the deductions above specified, shall be distributed by the court, in the manner hereinafter provided, among the eligible customers, of the following utilities:

The Peoples Gas Light and Coke Company.

Public Service Company of Northern Illinois.

[fol. 92] Western United Gas & Electric Company.

Northern Indiana Public Service Company.

Cedar Rapids Gas Company.*
 Central States Electric Company.
 City of Nebraska City.
 Iowa City Light & Power Company.*
 Iowa-Nebraska Light & Power Company.
 Iowa Power & Light Company.
 Illinois-Northern Utilities Company.
 Kewanee Public Service Company.
 Ottumwa Gas Company.*
 Peoples Light Company.*
 Peoples Power Company.*
 Princeton Gas Service Company.
 United Gas Service Company.

All work in effecting such distribution shall be performed under the supervision of Mr. Tappan Gregory, as officer for the court. All expenses connected therewith, and the amounts paid therefor, and for services rendered, shall be fixed by this court save only the Clerk's fees which are fixed by statute.

3. Any customer of the utilities who received gas service during all or any part of the period from August 1, 1940 to March 31, 1942, inclusive, hereinafter called the "refund period," in a qualified community (except at an industrial gas rate) shall be eligible for a refund. He is hereby named "eligible customer." A refund shall be payable to any eligible customer on the basis of the amount billed or treated as having been billed to him during any complete monthly billing cycle commencing not earlier than the date hereof and ending not later than October 31, 1942, for gas service as above defined. The amount of such bill shall be multiplied by the number of months during the refund period in which he received such service. For such purpose, any fraction of a month for which a bill was rendered shall be treated as a month, but the number of months shall not exceed twenty. The resultant amount is the customer's "refund base." The aggregate of the refund bases shall be divided into the net amount available to the customers, in the aggregate, of such utility; and the refund payable to [fol. 93] each such customer shall then be computed by mul-

* Now Iowa-Illinois Gas & Electric Company.

tiplying such customer's refund base by the quotient so obtained.

4. To determine the amount of the refund payable to each customer:

(a) Each utility shall expeditiously prepare from its records a list of the customers in qualified communities to whom it has sent a bill for gas service (except industrial) during the billing cycle hereinbefore designated. Such list shall, without improper duplication, contain the name of each such customer, his address and the amount of his bill, and is referred to as the "trial register list."

(b) The utility shall ascertain, if conveniently possible, as to each such customer, whether or not he received such service throughout the refund period.

(c) To each customer found to have received such service throughout the refund period, there shall be immediately sent a notice approved by and over the name of Mr. Gregory, advising the customer that his eligibility for a refund has been established and he may disregard any request by advertisement or otherwise for information on the subject.

(d) To any customer not found to have received service throughout the refund period there shall be sent a notice approved by and over the name of Mr. Gregory, requesting the customer to advise the utility within five (5) days on an enclosed form provided for that purpose, the address or addresses at which the customer received service from such utility during any part of the refund period. Such notice shall also state that upon the furnishing to the utility of the information requested the customer's eligibility for a refund on account of service furnished by such utility will be ascertained without further notice to him and he may disregard any further request by advertisement or otherwise for information as to service furnished by that utility. Such notice shall state that if during any part of the refund period he received gas service from any other of the utilities named herein he should communicate with said other utility in response to a newspaper advertisement later to be published. The notice last above provided for may be combined with the notice provided for in (c) in a single notice, in Mr. Gregory's discretion.

[fol. 94] (e) The utility shall expeditiously add to the trial register list the names of any other persons shown by

its records to have received such gas service during the specified billing cycle, but who failed to receive bills, and shall send to such additional persons the appropriate notices.

(f) The utility shall likewise adjust the said list so as to state opposite the name of any customer so added to said list the amount determined as representing a normal billing to such customer in such billing cycle. Such amount shall be determined by the utility in accordance with its usual practice in computing "average" bills.

(g) The utility shall expeditiously adjust any customer's bill which during said billing cycle was abnormal, in accordance with its usual practice, so as to cause the said list to reflect a normal billing to that customer for such cycle.

(h) Mr. Gregory shall promptly, after October 31, 1942, cause to be published once in each qualified community, by means of one or more newspapers having general circulation in such community a notice addressed to the gas customers of all of the said utilities, advising them that any such gas customers (except industrial gas users) of such utilities during the refund period, who has not received a notice from such utility of the establishment of his eligibility, should give information to such utility, either upon a coupon furnished with such advertisement or otherwise, in writing, as to the address or addresses at which he so received such service. Such advertisement shall notify the customer that if he had theretofore given to a utility written information as to such gas service received by him from it, he should not repeat to that utility such information in response to the advertisement and shall also state that eligibility will depend upon the verification of the information by the records of the utility. The advertisement shall also state that unless the requested information shall be received from the customer within 15 days from the date of the advertisement (whether in response to the advertisement or otherwise) it will be disregarded in determining eligibility.

(i) On the basis of all the information so obtained, the utility shall, after verification thereof, further adjust its trial register list by including the names of any newly ascertained eligible customers.

[fol. 95] (j) Opposite the names of any customer so added to the list as provided in (i), the utility shall place an amount determined in accordance with its usual practice as representing a normal billing to such customer for the billing cycle on the basis of which such list was prepared.

(k) Opposite the name of each customer included in said list as so corrected, the utility shall state the number of months within the refund period during which such customer received from it gas service (except for industrial use) and shall strike the names of all customers who have not been ascertained to have received such service during any part of the refund period. It shall then state opposite each remaining name the refund base (being the product of said bill multiplied by the number of months of service shown).

(l) The utility shall add together the refund bases of all the customers on the final list, and shall show the total.

(m) The utility shall thereupon certify such total to Mr. Gregory as shown by the completed list prepared as above described (hereinafter referred to as the "eligible customer list"). The utility shall at the same time certify and furnish to Mr. Gregory a statement listing all the communities in which gas originally derived by it, directly or indirectly, from Natural Gas Pipeline Company of America entered into the gas supplied by the utility during the refund period or any part thereof. In such statement, the communities shall be divided into two groups, one group consisting of qualified communities and the other of unqualified communities, and the basis for such classification shall be shown therein as to each community or group of communities. Such statement shall also show the number of eligible customers in each qualified community.

(n) Mr. Gregory shall submit an estimate of all costs and expenses of effecting such refund. He shall report, as to each of the several utilities, the aggregate of the refund bases of its eligible customers.

(o) The court will then determine the total net amount available for refund, and the portions thereof applicable to the eligible customers, in the aggregate, of each utility.

(p) Mr. Gregory shall then cause each utility to enter on its eligible customer list the amount of refund payable to each customer.

[fol. 96] (q) Each utility shall thereupon certify to Mr. Gregory its eligible customer list showing the amounts entered pursuant to (p) above.

5. Following a determination of the amount of refund due to each eligible customer in the manner above stated, Mr. Gregory shall, as conveniently and speedily as may be done, cause refund checks to be prepared, in one or more forms as he may elect, drawn upon the banks which are depositaries of the funds so held by the Clerk of this court in this case, for the amounts of the refunds to which the said customers are respectively entitled hereunder. The Clerk of this court shall thereupon issue or cause to be issued the said checks, bearing his signature or a facsimile thereof, payable to the order of the respective customers in the proper amounts as so determined, and Mr. Gregory shall mail or cause to be mailed or otherwise delivered to each customer the check payable to him. Each of the said banks shall honor all checks so drawn on it by paying the respective amounts thereof to or to the order of the person or persons named therein, and said banks shall upon making such payments be absolved and released from all liability and claims with respect to any and all amounts so paid by them, respectively, and shall be entitled to full credit therefor in any and all accountings to be made with respect to said funds. Mr. Gregory is hereby authorized to determine the depository bank or banks upon which such checks shall be drawn at any time, and the Clerk of this court shall, at Mr. Gregory's direction, transfer funds from any one or more of such depository banks to any other one or more of such banks to facilitate the refunding herein contemplated. Each such refund check not presented for payment within 60 days from the date thereof to the depository bank upon which it is drawn shall, upon the expiration of said period, be null and void, and an inscription on the face thereof shall so state. Each such refund check shall be accompanied by a statement, either on an attached stub or otherwise, on behalf of this court, approved by and over the name of Mr. Gregory, explaining to the payee the occasion for the refund which it represents.

6. It shall be proper for Mr. Gregory, and he is hereby authorized, to employ the services of any one or more persons or agencies selected by him to facilitate the refunding herein contemplated, and to include the expense so incurred

in his estimate of the cost of making the refund. Among [fol. 97] the agencies which it shall be proper for Mr. Gregory so to employ are the utilities herein named, or any one or more of them, but no utility so employed shall receive any compensation for such service beyond reimbursement for actual reasonable costs and expenses incurred by it by reason of the performance of such service. Such compensation to be fixed by this court.

7. The several utilities shall, upon order of this court, be reimbursed for all costs and expenses reasonably incurred by them in complying with the requirements of this decree or the requirements of Mr. Gregory hereunder. For such reimbursement and for payment of any other costs or expenses incurred under the authority of this decree (when approved by Mr. Gregory), checks in the proper amounts shall be drawn and signed by the Clerk of this court, at Mr. Gregory's direction, upon one or more of the said depository banks, and shall be duly delivered to the payees thereof by Mr. Gregory.

8. The utilities named herein, and each of them, shall co-operate with Mr. Gregory with all reasonable diligence in carrying out the purposes of this decree and shall comply with any and all reasonable requests he may make of them hereunder in connection with the carrying out of the purposes of this decree; but neither Mr. Gregory nor any utility shall be liable on account of errors of a bookkeeping or clerical nature, or for the consequences of any act or omission occurring in the course of his or its carrying out, while acting in good faith and with reasonable diligence, the directions contained in or authorized by this decree.

9. Mr. Gregory and the Clerk of this court shall be entitled to rely upon any and all written representations or statements made to them or either of them by the utilities or any of them or by said depository banks or any of them, or by any of said banks or any other agency designated by Mr. Gregory as disbursing agent for any part of the refund involved herein, in connection with the carrying out of the requirements herein directed or authorized. Likewise, each of the depository banks shall be entitled to rely upon any and all written representations or statements made to such bank by the utilities or any of them or by Mr. Gregory or by the Clerk or by any person or persons employed by Mr.

Gregory or the Clerk in connection with the carrying out of the requirements herein directed or authorized.

[fol. 98] 10. Mr. Gregory shall, prior to the entry by this court of the further order referred to above in subparagraph (c) of Paragraph 4, make a report to this court, advising it of terms and conditions appropriate for inclusion in a further order of the court providing for steps to be taken and procedure to be followed in special situations which may be anticipated in connection with the making of the refunds, such as cases wherein the identity of the payee may be in doubt or in dispute, or the original payee may have died, or other situations, like or unlike the above, in which the making of the refund cannot necessarily be accomplished merely by delivery of a check to the specified payee as contemplated above.

11. Mr. Gregory shall from time to time, during the carrying out of the refund operations herein provided for, make such current reports to the court as the court may request, and, upon the completion of the work of distributing the refunds, shall make a report to the court, showing (1) such completion; (2) the general procedure followed by him in supervising the work and in reasonably assuring himself that the method of refund herein ordered has been properly and accurately carried out; (3) an itemized statement of the Clerk's charges and of all expenditures from the fund to cover costs and expenses of distribution; (4) the total amounts of the refunds (by groups of customers of the respective utilities involved); and (5) the balance remaining in the fund.

12. This court reserves and retains jurisdiction of this cause, the parties hereto, and the moneys deposited in the special funds in the said banks, depositaries hereunder, for the purpose of supervising and enforcing this decree and the payment of refunds herein ordered, and of making such other and further orders and decrees herein as may be necessary, suitable or appropriate to preserve, protect and settle the rights of the parties hereto and the rights of the several customers of said utility companies and of all persons having rights in said special funds; and nothing herein shall be deemed to preclude any party hereto from asking for the entry of additional or supplemental orders herein as above contemplated. The customers and former

customers, and all persons claiming by, through or on behalf of any such customer, and all other persons, are hereby enjoined and restrained from taking any action or instituting, maintaining or carrying on any suits or proceedings at [fol. 99] law, in equity, or otherwise, before any other tribunal, or in any other manner whatsoever, to obtain any such refunds, or any part thereof, in any manner except only such proceedings as they may take in this cause.

It is further ordered that the following named parties:

- Natural Gas Pipe Company of America, 20, No. Wacker Drive, Chicago, Illinois,
- Texoma Natural Gas Company, 20 No. Wacker Drive, Chicago, Illinois,
- Mr. George I. Haight, 209 So. La Salle Street, Chicago, Illinois,
- Mr. Warren T. Spies, 20 No. Wacker Drive, Chicago, Illinois,
- Mr. J. J. Hedrick, 20 No. Wacker Drive, Chicago, Illinois,
- Mr. S. A. L. Morgan, 20 No. Wacker Drive, Chicago, Illinois,
- The Iowa-Illinois Gas & Electric Company, (Merger of Iowa-City Gas Light & Power Co., Ottumwa Gas, Peoples Light Co., Peoples Power Co.), attention Mr. Thomas K. Humphrey, Room 2200, 105 W. Adams Street, Chicago, Illinois,
- The Iowa-Nebraska Light & Power Co., 923 Sharp Bldg., Lincoln, Nebraska; Mr. George A. Lee, General Counsel, and L. R. King, Pres., Gas & Elec. Bldg., Lincoln, Nebraska,
- The Illinois Commerce Commission, Mr. Albert E. Hallett, 208 S. La Salle Street,
- Hon. George F. Barrett, The Attorney General of Illinois, Springfield, Illinois,
- The Federal Power Commission, Washington, D. C., Attention Messrs. George Slaflf, and Richard J. Connor, General Counsel,
- The Central States Elec. Co., Cedar Rapids, Iowa, Attn. Mr. Frank A. Fratcher,
- The City of Nebraska City, Nebraska City, Nebraska, Mr. John M. Dierks, City Attorney,
- The Iowa-Power & Light Co., 312 Sixth Ave., Des Moines, Ia.,

- Kewanee Public Service Co., Kewanee, Illinois,
 Princeton Gas Service Co., Princeton, Illinois,
 [fol. 100] United Gas Service Co., Bartlesville, Oklahoma, attn. Lloyd A. Rowland, Union Nat. Bank Bldg., Bartlesville, Okla.,
 Central Power Co. and Consumers Public Power District, Attn. William H. Pitzer, Building & Loan Bldg., Nebraska City, Nebraska,
 Western United Gas & Elec. Co., 20 No. Wacker Drive; Chicago, Illinois,
 Mr. Benjamin Alschuler, 32 Water Street, Aurora, Illinois,
 Chicago District Pipeline, 122 So. Michigan, Chicago, Illinois,
 Peoples Gas Light & Coke Co., 122 So. Michigan, Chicago, Illinois,
 Mr. Kenneth F. Burgess, 11 So. La Salle Street, Chicago, Ill.,
 Mr. Francis L. Dailey, 122 So. Michigan, Chicago, Illinois,
 Public Service Company of Northern Illinois, 72 W. Adams St., Chicago, Illinois, Mr. Harry J. Dunbaugh, 72 W. Adams St., Chicago, Illinois,
 Illinois Northern Utilities,
 The Attorney General of Iowa, representative of the gas consumers of Iowa, Des Moines, Iowa,
 The Attorney General of Nebraska, representative of the gas consumers of Nebraska,
 The Attorney General of Oklahoma, representative of the gas consumers of Oklahoma,
 The Attorney General of Indiana, representative of the gas consumers of Indiana, Indianapolis, Indiana,
 The Northern Indiana Public Service Co.,
 Mr. Marshall Joyce, A. J. Joyce, Oscar Claessens, Otto Millard, R. Lyon, R. A. Nelson, Mrs. Barbara Schmit, F. Glenn Shehee, John A. Quigley, S. O. Hansen, John C. Ide, S. Morcel, Jr., Jerome J. Novy, Leonard W. Wolfe, A. R. Ramser, G. J. Hermes, Dr. Arthur R. Weihe, Wilbur Millard, M. J. McDermott, Ernest A. Bederman, Benjamin Scheffel Gardner E. Larson—represented by Attorneys Floyd Thompson, Anan Raymond, and Albert E. Jenner, Jr., 11 So. La Salle St., Chicago, Ill.
 Cedar Rapids Gas Co.,

[fols. 101-102] and whomever else it may concern show cause if any they have, within twenty days after service of this decree, why this decree, as well as any other orders of this court entered in this matter respecting the distribution of the funds involved, and the costs and expenses of said distribution, should not be binding upon them.

The court requests the Illinois Commerce Commission and the Attorney General of Illinois to appear and represent all the customers and advise the court, if either finds any inequities in the plan of distribution set forth in this decree.

By the Court:

— — —, Clerk.

September 3, 1942.

* * * * *

[fol. 103] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

ORDER EXTENDING TIME—September 22, 1942

On further consideration by the court of the decree entered in the above entitled cause on September 3, 1942, it is

Ordered that the time within which the parties therein named and referred to shall show cause why the decree should not be binding upon them be and it hereby is extended for a further period of fourteen (14) days from and after the expiration of the twenty (20) day period now specified in the said decree for that purpose.

Enter: (S.) Evan A. Evans, William M. Sparks.

September 18, 1942.

9-22-1942.

* * * * *

[fol. 104] And afterwards, to-wit: On the nineteenth day of November, 1942, the following further proceedings were had and entered of record, to-wit:

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION, et al., Respondents

ORDER MODIFYING DECREE OF SEPT. 3, 1942—November 19,
1942

It is hereby ordered by the Court that the decree heretofore entered on September 3, 1942, be modified in the following respect: The fourth paragraph on page 7, being paragraph (h), is amended to provide for a period of five days instead of fifteen days.

[fols. 105-106] IN UNITED STATES CIRCUIT COURT OF APPEALS

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No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents

ORDER RE: CENTRAL STATES ELECTRIC COMPANY—November
24, 1942

There has arisen in this matter a distinct issue relative to the distribution of the refund to the Central States Electric Company, of Cedar Rapids, Iowa, which purchased gas from the Natural Gas Pipeline Company of America. The facts are, that during the refund period in question this company

purchased from the Natural Gas Pipeline Company, gas, for which a refund of \$25,708.54 has been allocated.

The Central States Electric Company has raised the issue as to whether it, or its 3,715 customers, have the right to the refund.

Inasmuch as the determination of this matter would inevitably consume time, by whomever determined, we have concluded that the interest of the Iowa purchasers in this fund, to-wit: \$25,708.54, shall be, and it is hereby, separated from fund heretofore deposited, and it shall be separately dealt with. This separation is made so that there may be no delay in the distribution of the vastly greater portion of the fund, to those determined to be entitled thereto.

(S.) William M. Sparks, Otto Kerner.

November 24, 1942.

[fol. 107] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

Before Evans, Sparks and Kerner, Circuit Judges

SUPPLEMENTAL DECREE—December 15, 1942

This cause now comes on to be heard upon the report of Mr. Tappan Gregory, as officer for this Court to effect and supervise the distribution of refunds, filed pursuant to paragraph 10 of the decree entered herein on September 3, 1942, advising the Court of certain terms and conditions appropriate for inclusion in a further order of the Court providing for steps to be taken and procedure to be followed in special situations which may be anticipated in connection with the making of the refunds.

In and by paragraph 12 of the said decree of September 3, 1942, it was ordered that the parties named therein show cause, within 20 days (extended to 34 days by order entered

September 22, 1942) after service of said decree, why said decree, as well as any other orders of this Court entered in this matter respecting the distribution of the funds involved, and the costs and expenses of said distribution, should not be binding upon them. It appears to the Court that copies of said decree were duly served by the Clerk on or shortly after September 4, 1942 upon all of said parties; and that, in response to said show cause order, or otherwise, none of said parties made any showing to this Court why said decree should not be binding upon them, with the exception of Marshall-Joyce, et al., whose amended and supplemental motion for leave to intervene (attached to which [fol. 108] motion were certain suggestions with respect to said decree) was overruled by order entered herein on October 15, 1942, and with the further exception of Central Power Company and Consumers Public Power District of Nebraska, the claims and interest of which two parties, together with the claim and interest of the City of Nebraska City, to and in a portion (\$23,991.23) of said funds were, by order entered herein on October 12, 1942, segregated and directed to be dealt with separately, and with the further exception of Central States Electric Company, the claim and interest of which Company to and in a portion (\$25,708.54) of said funds were, by order entered herein on November 24, 1942, segregated and directed to be dealt with separately. The Court therefore finds that said decree, as to all parties except said Central Power Company, Consumers Public Power District of Nebraska, Nebraska City and Central States Electric Company, became effective on September 3, 1942 and is now in full force and effect.

It also appears to the Court from said report that it may be anticipated that some of the persons whose names will appear on the trial register lists or eligible customer lists of the utilities are, or prior to the time that the refund checks issued to such persons are presented for payment will be, deceased, insane or otherwise incompetent, adjudicated bankrupts, incarcerated in prisons or concentration camps, enemy aliens or other aliens residing in countries whose credits or other assets are frozen, dissolved corporations or partnerships, or personal representatives, trustees, receivers or other fiduciaries whose fiduciary relations will have been discharged or otherwise terminated; and that it may be anticipated that some of the names which will appear on said lists will be misspelled or fictitious or assumed

by the persons who actually received the gas service, and that [fol. 109] there will be other persons who were receiving gas service in the names of other persons, whose correct names should be or should have been included in said lists, and that special provisions must be made for the payment of refunds in such special situations.

And it also appearing to the Court that additional provisions should be made to facilitate the making of refunds,

It is therefore ordered, adjudged and decreed as follows:

1. In those cases where a person notifies Mr. Gregory in writing that he received gas service during the whole or a portion of said refund period at a given address in the name of another person and claims the refund due on account of such service, and such notice is received by Mr. Gregory prior to the time the adjustments in the trial register list of the utility furnishing such service in accordance with paragraph 4(i) of the decree of September 3, 1942 have been completed, Mr. Gregory shall promptly advise such utility of such claim, and such utility shall examine its records and trial register list, and (a) if it finds that no eligible customer is then shown upon said list to be entitled to a refund for gas service furnished at such address during the period designated in such claim but that gas service was furnished at that address and during that period to some person, the utility shall add the name of the person, who according to its records received such service, to its trial register list as an eligible customer for such period; or (b) if it finds that the name of the person to whom, according to the records of the utility, gas service was furnished at such address during the period designated in such claim is then shown upon said trial register list, such utility shall permit the name of such person to remain on said list; provided, however, in all such cases the utility shall place an appropriate notation opposite the name added to or the name permitted to remain on said list pursuant to the provisions of (a) or (b) hereof to indicate that [fol. 110] another person claims to be the eligible customer entitled to the refund on account of such service, and no refund check shall be mailed or otherwise delivered to the person opposite whose name such notation has been placed or to the person making such claim until the latter person shall have had an opportunity to establish his right, if any,

to said refund in the manner prescribed for establishing similar claims under paragraph 2 hereof.

2. Where a refund check has been issued and mailed or otherwise delivered to an eligible customer, and another person, within sixty (60) days after the date of such check, claims to have received the gas service during the whole or a portion of the refund period for which said refund check was issued, and in writing requests Mr. Gregory to issue a refund check to him in lieu of the original refund check issued to said eligible customer, and where at the time of making such request said original refund check has not been paid by the depository bank upon which it was drawn but has been returned to Mr. Gregory or has become void by the passage of time, and where such other person furnishes to Mr. Gregory, within ten (10) days after making such request, such affidavits, releases or waivers as Mr. Gregory may reasonably require, Mr. Gregory shall send a notice in writing addressed to the person who according to the records of the utility received gas during the period and at the address in question, at his last known address, advising such person that such claim has been made; and in the event the person to whom such notice is directed shall fail to notify Mr. Gregory in writing within fifteen (15) days of the date of mailing such notice that he objects to the claim of such other person, the person making such claim shall be an eligible customer (in lieu of the original eligible customer), and Mr. Gregory shall prepare or cause to be prepared and the Clerk of this Court shall issue or cause to be issued a refund check which shall be payable to [fol.111] and mailed or otherwise delivered to said other person; provided, however, if the person making such claim furnishes Mr. Gregory with evidence satisfactory to him, showing that the person whose name appears on the records of the utility as the customer who received gas service during said period at said address, died prior to or during the refund period and the claim of such other person relates only to the refund payable for gas service rendered after the date of death of such deceased customer, no notice of the claim of such other person need be given.

3. In those cases where Mr. Gregory receives written notice prior to the mailing or other delivery of a refund check that an eligible customer entitled to such refund is

(a) deceased, (b) insane or otherwise incompetent to handle his own affairs, (c) a partnership or corporation which has been dissolved or which has ceased doing business, (d) incarcerated in any prison or penitentiary and by reason thereof is by law rendered incapable to receive, execute a lawful release with respect to and receipt for such refund, (e) an alien enemy confined in a concentration camp within the United States or an alien enemy or other alien residing without the United States in a country the credits and other assets of which are frozen, or (f) a receiver, trustee, administrator, executor, conservator, trustee in bankruptcy or other representative or agent who has been discharged as such representative or agent; or where Mr. Gregory receives written notice prior to the mailing or other delivery of such refund check that a receiver, trustee in bankruptcy or other representative or agent has been appointed for and is entitled to the possession of the property of an eligible customer, Mr. Gregory shall not mail or otherwise deliver a refund check payable to such eligible customer, but shall delay the mailing or other delivery of such check until the persons entitled to the refund of such eligible customer shall have an opportunity to establish [fol. 112] their right to such refund by such evidence as Mr. Gregory may reasonably require, in accordance with the provisions of this Supplemental Decree. Such evidence shall be submitted to Mr. Gregory within 15 days after Mr. Gregory shall have mailed a request for the submission of evidence. In each case where a question arises under the terms of this paragraph 3, or other provisions of this Supplemental Decree, as to the person or persons entitled to receive a refund, the aggregate amount of the refund payable to such person or persons shall only be that which is specified, as applicable to such case, in the eligible customer list.

4. The Clerk of this Court may issue or cause to be issued and Mr. Gregory may mail or otherwise deliver a new refund check or checks payable to the person or persons entitled thereto as determined in accordance with the provisions of this Supplemental Decree, in lieu of a refund check originally issued and mailed or otherwise delivered to an eligible customer, when requested in writing by the payee of such original check or the person entitled to the refund represented by such check, in every case where the name

of the payee is misspelled, or where the payee thereof is (a) deceased, insane or otherwise incompetent to handle his own affairs (b) a partnership or corporation which has been dissolved or which has ceased doing business, (c) incarcerated in any prison or penitentiary and by reason thereof is by law rendered incapable to receive, execute a lawful release with respect to and receipt for such refund, (d) an alien enemy confined in a concentration camp within the United States or an alien enemy or other alien residing without the United States a country the credits and other assets of which are frozen, (e) a receiver, trustee, administrator, executor, conservator, trustee in bankruptcy or other representative or agent who has been discharged as such representative or agent, or (f) an eligible customer, all or substantially all of whose assets have been taken over by a receiver, trustee in bankruptcy or other representative or agent; provided, (1) such request is received by Mr. Gregory within ninety (90) days from the date of such original refund check, and (2) the original refund has not been paid by the depository bank upon which it [fol. 113] was drawn but has been returned to Mr. Gregory at or prior to the time such request is made, and (3) the person making such request furnishes to Mr. Gregory within fifteen (15) days thereafter such affidavits, releases, waivers or other documents as Mr. Gregory may reasonably require in accordance with the provisions of this Supplemental Decree.

5. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof that the eligible customer entitled to such refund has died, and where he has received an affidavit substantially in the form of Exhibit A or Exhibit B attached hereto, the refund shall be made to the person or persons hereinafter prescribed:

(a) In every case where no probate proceedings have been had in connection with the estate of a deceased eligible customer who would have been entitled to a refund if living, any refund to which such deceased eligible customer would have been entitled if living shall be paid to the person or persons entitled thereto as determined by the provisions of Sections 11-14, 178, 179 and 324 of the Probate Act of the State of Illinois,

without regard to the amount or value of the personal property left by such decedent, without regard to whether or not such decedent left what purports to be a will, and without regard to whether or not the debts of the deceased eligible customer have been paid, and without regard to the domicile of such deceased eligible customer.

(b) In every case where an eligible customer who would have been entitled to a refund if living, has died intestate and probate proceedings were held in connection with his estate but such probate proceedings have been closed and the administrator of such estate has been discharged, the refund to which such deceased eligible customer would have been entitled shall be paid to the person or persons entitled thereto as determined by the provisions of Sections 11-14, 178, 179 and 324 of the Probate Act of the State of Illinois, without regard to whether or not the debts of such deceased eligible customer have been paid and without regard to the domicile of said deceased eligible customer.

(c) In every case where an eligible customer who would have been entitled to a refund if living, has died leaving a will and such will has been probated but the probate proceedings have been closed and the personal representative has been discharged, the refund to which such deceased eligible customer would have been entitled shall be paid to the residuary legatee or legatees designated in and by said will, and if there be no residuary legatee or legatees, then to the person or persons entitled thereto as determined by the provisions of Sections 11-14, 178, 179 and 324 of the Probate Act of the State of Illinois, without regard to whether or not the debts of such deceased eligible customer have been paid, and without regard to the domicile of said deceased eligible customer.

(d) In every case where an eligible customer who would have been entitled to a refund if living, has died and probate proceedings in connection with his or her estate are still pending when such refund becomes payable, such refund shall be paid to the executor or administrator of such estate.

(e) Where a person determined to be entitled to a refund under the foregoing sub-paragraphs (a) to (d), inclusive, is a minor, the refund check for that portion of the refund to which such minor is entitled may be issued to the duly constituted guardian, if any, of such minor; or if there be no such guardian then to the natural guardian of such minor (i. e., the surviving parent, if any, or eldest brother or sister if there be no surviving parent and if such eldest brother or sister is of legal age, otherwise to any one of the adult next of kin) upon delivery to Mr. Gregory of the written receipt of such natural guardian stating that he or she has [fol. 115] received such refund and will hold or expend the same for the benefit of such minor; or, in Mr. Gregory's discretion, to such minor.

(f) Where under the provisions of the foregoing paragraphs (a) to (e) inclusive, more than one person is determined to be entitled to the refund, then in the discretion of Mr. Gregory (1) the refund check may be made payable to all of such persons and mailed or otherwise delivered to any one of them, or (2) separate payments may be made to such persons or any of them, as their interests may appear to Mr. Gregory, or (3) the refund, or any part thereof, may be paid to any one of such persons upon the latter's furnishing to Mr. Gregory a written undertaking to account to all persons entitled thereto for their proper shares of such payment.

6. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that the eligible customer entitled to such refund is insane or otherwise incompetent to handle his own affairs, the refund shall be paid to the duly constituted conservator, if any, of such customer, and if there be no such conservator then to the spouse of such customer, if any, and if none, to the eldest adult son or daughter of such customer, and if none, then to any one of the adult next of kin of such customer; such refund to be made on the basis of any affidavits which Mr. Gregory may require and upon delivery to Mr. Gregory of the written receipt of the person so receiving such refund stating that he or she has received and will hold or expend the same for the benefit of such insane or otherwise incompetent customer.

7. Where a partnership, whether still in existence or dissolved, was the eligible customer entitled to any refund, the [fol. 116] refund check shall be issued payable to the order of such partnership or jointly in the names of the individual partners or former partners of whose identity Mr. Gregory may be advised and mailed or otherwise delivered to any one or more of such partners or former partners, and neither the depository banks, nor Mr. Gregory nor the Clerk of this Court shall be under any obligation to see to the appropriate division of the proceeds of such check among the persons entitled thereto.

8. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 and 4 hereof, that the eligible customer entitled to such refund is a corporation which has been dissolved or which has ceased doing business, the refund check shall be made payable, in the discretion of Mr. Gregory, either to the corporation or to the person who at the time of such dissolution or termination of business occupied the office of treasurer of such corporation, such refund to be made on the basis of any affidavit which Mr. Gregory may require and, if payable to such treasurer, upon delivery to Mr. Gregory of a written receipt by such treasurer stating that he has received such refund and will hold or expend the same for the benefit of the person or persons entitled to the assets of such corporation.

9. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that the eligible customer entitled to such refund is incarcerated in any prison or penitentiary under circumstances which do not deprive him of the right to receive, give a lawful release with respect to and receipt for moneys owing or payable to him, any such refund check shall be issued and forwarded to such eligible customer at such prison or penitentiary; provided, however, that where in such case Mr. Gregory is duly and reliably informed that such eligible customer by reason of such incarceration is by law rendered incompetent to receive, execute a lawful [fol. 117] release with respect to and receipt for such refund, then such refund shall be paid to the spouse of such person, if any, and if none, to the eldest adult son or daughter of such person, and if none, then to anyone of the adult next of kin of such person, such refund check to be issued

on the basis of any affidavit or affidavits which Mr. Gregory may require and upon delivery to Mr. Gregory of the written receipt of the person so receiving such payment stating that he or she has received and will hold or expend such money for the benefit of such incarcerated person.

10. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that during the period for which refunds are to be made there has been a change of customer from an original customer to a receiver, trustee, administrator, executor, conservator, trustee in bankruptcy or other representative or agent of such customer, and it appears to Mr. Gregory that the receiver or such other representative is still acting as such, the refund, both for the period for which said customer received service and for the period during which said receiver or other representative received service, shall be paid to such receiver or other representative.

11. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that during the period for which refunds are to be made there has been a change of customer from the original customer to a receiver or other representative of such customer and thereafter a subsequent change back to the original customer, the refund due on account of gas service during any or all of the three periods mentioned shall be paid to the original customer; and where such notice shows that the gas service was rendered after the termination of the second period (receivership) mentioned, to a customer other than the original customer for whom the receiver or other representative was acting or appointed, the refund due on account of gas service rendered [fol. 118] during all of such period shall be paid to such other customer if it appears to Mr. Gregory that such other customer is in fact the original customer or a reorganization of the original customer as a result of such receivership or other proceedings, or if it similarly appears that such other customer purchased the business of such original customer pursuant to an arrangement whereby such other customer acquired all or substantially all of the assets, including accounts receivable, of the original customer; and if it appears to Mr. Gregory that there is no conne-

tion whatsoever between such original customer or the receiver or other representative for such original customer, and such other customer, then only the portion of the refund due for the period during which gas service was rendered to such other customer shall be paid to such other customer.

12. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that gas service has been terminated during the period when a receiver or other representative was the customer and a final bill on account of gas service was issued in the name of such receiver or other representative or his or its successor in interest, the refund on account of gas service during said period shall be paid to such receiver or other representative or successor, as the case may be, or to the assignee of such receiver, other representative or successor, whether the assignee be the original customer for which the receiver or other representative or successor was acting or appointed, or a third party.

13. In those cases where Mr. Gregory has notice in accordance with the provisions of preceding paragraphs 3 or 4 hereof, that during the refund period there has been a change of customer from a receiver, trustee, administrator, executor, conservator, trustee in bankruptcy or other representative or agent of a customer, to a successor receiver [fol. 119] or other representative, and such successor is still acting as such, the refund, both for the period for which the predecessor receiver or other representative would have been entitled to receive a refund but for such successor, and for the period during which such successor was the customer, shall be paid to such successor.

14. In those cases where Mr. Gregory has notice that the eligible customer or the person entitled to the refund or a part thereof is a "blocked national" or is an alien whose property is "frozen" or is subject to the control of the Alien Property Custodian or other officer of the United States, such refund or part thereof shall be paid to or as authorized by the proper officer of the United States entitled thereto under the applicable laws of the United States, or if no such officer is entitled thereto under said laws, then no payment of such refund or part thereof shall be made until the further order of this Court.

15. Except as in this Supplemental Decree otherwise provided, no lien, garnishment, assignment or other transfer of or power of attorney relating to any refund or part thereof due under the decree entered herein September 3, 1942, or under this Supplemental Decree, shall be valid or enforceable as a claim against the depository banks, Mr. Gregory, the Clerk of this Court or the funds held by the Clerk of this Court; provided, however, that, subject to the provisions of the Soldiers and Sailors Civil Relief Act of 1940 as amended, the depository banks, Mr. Gregory and the Clerk of this Court may recognize an assignment, power of attorney or other written authorization executed by an eligible customer who is in the armed forces of any of the United Nations, and the refund represented by any refund check issued and paid in reliance upon such authority shall thereupon be considered wholly satisfied and discharged to the extent of the payment so made. Nothing herein contained, however, shall be construed so as to prevent or prohibit the endorsement or negotiation of [fol. 120] refund checks issued pursuant to this Supplemental Decree or other order of the court herein by attorney in fact or other means recognized in the field of commercial instruments.

16. The only obligation of the banks, depositories hereunder, shall be to pay to the payees thereof, or to their order, any and all checks which may be drawn against said deposited funds, to the extent thereof, without any duty or obligation upon the part of said banks to see to the propriety of the issuance thereof. The banks shall be entitled to pay, and to charge such deposited funds for, all such checks regardless of by whom or by what means the actual or purported facsimile signatures thereon may have been affixed thereto, if such signatures resemble the facsimile specimens duly certified by Mr. Gregory. Said banks shall, upon making such payments, be absolved and released from any liability and claims with respect to any and all amounts so paid by them respectively, and shall be entitled to full credit therefor in any and all accountings to be made with respect to said funds.

17. The banks shall be under no duty or obligation to stop payment of any checks, nor shall they be under any duty or obligation to pay any refund check upon the endorsement of any executor, administrator, heir, legatee,

conservator, trustee, receiver, guardian or other representative of the payee or of the estate of a deceased payee of any such refund check, but such banks are hereby permitted at their election to pay any such check to, or upon the order of, any such representative if such representative is entitled to receive payment of the refund represented by such check as in this Supplemental Decree provided.

18. Neither Mr. Gregory nor the Clerk of this Court nor any utility or person delegated by Mr. Gregory or by the Clerk of the Court shall be liable on account of any errors or mistakes in judgment, or for the consequences of any act or omission occurring in the course of their carrying out, while acting in good faith and with reasonable diligence, the directions contained in or authorized by this Supplemental Decree, or any other orders entered by the Court herein. Neither Mr. Gregory nor the Clerk of this Court nor the depositary banks shall be required to see to the division of the proceeds of any refund check issued and delivered pursuant to the provisions hereof or of any other order of the Court herein among any persons entitled thereto, or to the application of such proceeds.

19. Whenever any refund check issued and mailed or otherwise delivered pursuant to the provisions hereof or of any other order of the Court herein has been paid, or has been outstanding and unpaid for a period of sixty (60) days or longer from the date thereof, or has been returned to Mr. Gregory because of the inability of the Post Office Department to locate the addressee thereof and is still held by Mr. Gregory sixty (60) days or longer after the date of such check, the refund covered by such check shall be considered wholly satisfied and discharged to the extent of the amount thereof, and no person shall thereafter have any valid claim on account of such refund or against the fund held by the Clerk of this Court to the extent of the amount of such check.

20. Mr. Gregory is hereby authorized and directed to specify as to each of the utilities, a date after which no further information received from customers (whether in response to any notice, advertisement or otherwise) shall be considered by such utility in completing its eligible customer list; and after the total refund base for any utility, as shown by the completed eligible customer list of such utility, shall have been certified to Mr. Gregory

pursuant to sub-paragraph 4(m) of said decree, no further changes shall be made in such list.

[fol. 122] 21. This Supplemental Decree is entered for the purpose of implementing the decree entered herein on September 3, 1942, and is not to be construed as superseding the provisions contained in or limiting the force of such former decree.

By the Court:

_____, Clerk.

[fol. 123]

EXHIBIT "A"

Affidavit Re Estate Less than \$500 in Value

(The blank spaces in this form should be carefully filled in before execution. Of paragraphs (a), (b) and (c), the applicable paragraph should be retained and the other two paragraphs should be stricken.)

STATE OF _____,

County of _____ ss.

_____, whose address is

_____, being first duly sworn

deposes and says:

(name of decedent), a resident of

_____, County of

_____, State of _____, died on

the _____ day of _____, 19____, leaving personal estate

of less than \$500 in value in the aggregate; and that from August 1, 1940, to March 31, 1942, said decedent was a gas

customer of _____ (name of utility) in the

(village, town or city) of _____, State of

_____, at the addresses and during the periods, respectively, as follows:

(Address _____ from _____ to _____)

(Address _____ from _____ to _____)

(Address _____ from _____ to _____)

That said decedent, if living, would be entitled to a refund check as an eligible customer of said utility, issued by the

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and drawn upon The First National Bank of Chicago, which is the depository of the funds held by the Clerk of said court out of which said refund is required to be made under and pursuant to the provisions of the decree of said Circuit Court of Appeals entered September 3, 1942, [fol. 124] in the cause entitled "Natural Gas Pipeline Company of America and Texoma Natural Gas Company vs. Federal Power Commission and Illinois Commerce Commission, No. 7454."

That no letters testamentary or of administration are now outstanding on the estate of said decedent and no petition for any such letters is pending in any state; that all funeral expenses of decedent have been paid, and that thirty days have elapsed since the death of said decedent.

(a) That under Sections 178 and 179 of the Probate Act of the State of Illinois, a widow's (child's) award is allowable to the widow (child); that this affidavit is made to induce Mr. Tappan Gregory and the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to prepare, issue and mail or otherwise deliver a check in the amount to which said decedent would be entitled, if any, payable to _____, who is the widow (child), all in accordance with the provisions of the decrees and orders of said Court.

(b) That no person is entitled, under the provisions of the decrees of said Court, and Sections 178 and 179 of the Probate Act of the State of Illinois, to a widow's or child's award; that decedent died intestate; that there are no creditors of the decedent, and that the names, places of residence, ages and relationship of the heirs of the decedent, as determined under the provisions of Section 11-14 of said Act, are as follows:

Name	Relationship to Decedent	Age	Address
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That this affidavit is made to induce Tappan Gregory as officer for the United States Circuit Court of Appeals for

the Seventh Circuit and the Clerk of said Court to prepare, issue and mail or otherwise deliver to each of said heirs a refund check for that portion of the amount of such refund to which said decedent would be entitled as an eligible customer, if living, to which such heir is entitled under Sections 11-14 of the Probate Act of the State of Illinois.

(c) That decedent left a last will which was admitted to probate in the State of _____ in the _____

Court of _____ County in proceedings numbered _____

; that a certified copy of said will is attached hereto; that no proceedings to contest said will are pending; that no person is entitled under the provisions of the decrees of this Court and Sections 178 and 179 of the Probate Act of the State of Illinois to a widow's or child's award; that there are no creditors of the decedent, and that the names, ages, relationship and places of residence of the heirs of the decedent, as determined under the provisions of Sections 11-14 of said Act, and the residuary legatees under the will are as follows:

[fol. 125]	Relationship	Age	Address
Name	to Decedent		
.....
.....
.....
.....
.....
.....
.....
.....
.....

That this affidavit is made to induce Tappan Gregory as officer for the United States Circuit Court of Appeals for the Seventh Circuit and the Clerk of said Court to prepare, issue and mail or otherwise deliver to each of said residuary legatees or to each of said heirs of said decedent, if no residuary legatee is named in said will, a refund check for that portion of the amount of the refund to which said decedent as an eligible customer would be entitled, if living, which such legatee or heir is entitled to receive under the said decrees and orders and the provisions of said Act.

That affiant has knowledge of the facts herein stated and that the same are true.

(Signature of Affiant)

Subscribed and sworn to before me this _____ day of _____, 194 . — — —, Notary Public.

[fol. 126]

EXHIBIT "B"

Affidavit Re Estate More Than \$500 In Value

(The blank spaces in this form should be carefully filled in before execution. Of paragraphs (a) and (b), the applicable paragraph should be retained and the other paragraph should be stricken.)

STATE OF

County of , ss.

, whose address is
, being first duly sworn,
on oath deposes and says:

That (name of decedent), a resident of
, County of , State of
, died in the County of ,
State of , on or about the day of
, 19 , leaving property or estate, the
value of which exceeded \$500, and that there have been no
proceedings in probate upon said estate.

(a) That said decedent died intestate; that no tax is due to the United States, the State of Illinois or the state of the domicile of said decedent by reason of the death of said decedent; that all debts of said decedent have been paid; that all heirs of said decedent, as determined in accordance with Sections 11-14 of the Probate Act of the State of Illinois, are of legal age, and that persons in interest in said estate desire to settle the estate without administration.

(b) That decedent left a last will which was admitted to probate in the State of in the
Court of County in
proceedings numbered ; that a certified copy of said will is attached hereto; that no executor was named in said will (or the sole executor or executors named in said will died, failed or refused to qualify); that no tax is due to the United States, to the State of Illinois or to the state of the domicile of said decedent by reason of the death of said

decendent; that all claims against the estate of said decendent have been paid; that all heirs, as determined in accordance with Sections 11-14 of the Probate Act of the State of Illinois, and legatees of said decendent are of legal age, and that the persons in interest in said estate desire to settle the estate without administration.

[fol. 127] That from August 1, 1940, to March 31, 1942, said decedent was a gas customer of _____

(name of utility)

in the of

(village, town or city)

County of _____, State of _____, at the
addresses and during the periods, respectively, as follows:

Address _____ from _____ to _____

Address from to

Address _____ from _____ to _____

That said decedent, if living, would have been entitled, as an eligible customer, to a refund check issued by the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, drawn upon The First National Bank of Chicago, depository of the funds held by the Clerk of said Court out of which refunds are to be made under and pursuant to the provisions of a decree of said Court entered September 3, 1942, in the cause entitled "Natural Gas Pipeline Company of America and Texoma Natural Gas Company vs. Federal Power Commission and Illinois Commerce Commission, No. 7454."

This affiant hereby represents to said The First National Bank of Chicago, to Tappan Gregory as officer for the United States Circuit Court of Appeals for the Seventh Circuit and to the Clerk of said Court that the following are the persons entitled to the personal property of said decedent under the laws of the State of Illinois:

Name	Relationship to Decedent	Age	Address
------	--------------------------	-----	---------

That affiant is the surviving
 (relationship)

of said decedent and one of the persons in interest in said estate and represents that said refund check should be issued to in accordance with the desires of all the persons interested in said estate.

That affiant has knowledge of the facts herein stated, that the same are true and that this affidavit is made to induce Tappan Gregory as officer for said Court, and the [fols. 128-129] Clerk of said Court to prepare, issue and mail or otherwise deliver, under and pursuant to the provisions of said decree entered September 3, 1942, of said Court, to said a refund check or checks in the aggregate amount to which said decedent would be entitled as an eligible customer, if living.

— — —, (Signature of Affiant).

Subscribed and sworn to before me this — day of
 —, 194—. — —, Notary Public.

[fol. 130] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
 NATURAL GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
 COMMISSION, Respondents

ORDER OF DISTRIBUTION—January 22, 1943

Before Evans, Sparks, and Kerner, Circuit Judges.

The matter of the distribution of the funds deposited with this court, pursuant to the order of this court entered in the above entitled matter, coming on to be heard, and it appearing that we have heretofore separated \$23,991.23 from the fund, which amount should be credited to what is termed the Nebraska City fund, over which there is a contest, and which is not now to be distributed,

And it further appearing that the time has now arrived when the court can and should direct the issuance of checks,

payable to the customers of the public utilities, against this fund,

And it further appearing that the total amount of expenses which have been necessarily incurred is, for the most part, fixed and definite, and this court having heretofore authorized Mr. Tappan Gregory, the agent of this court, to employ the services of persons or agencies selected by him to facilitate the refunding herein contemplated, and to include the expense so incurred in his estimate of the costs of making the refund and it being expressly provided that no utility so employed shall receive any compensation for such services beyond reimbursement for actual reasonable costs and expenses incurred by it and that such compensation is to be fixed by this court.

And it further appearing that certain expenses are definitely fixed and include such items as clerk's fees, a charge fixed by statute; the postage for two mailings to customers, blank check forms; stationery; advertisements or publications of notices of customers, all of which are approved.

And the court being desirous of distributing the funds available for distribution forthwith, and not being able at this time to determine and make findings upon the reasonableness and fairness of the items charged by the various utility companies for services and expenses,

It is ordered that from the fund deposited in this court, to-wit, \$6,377,913.52, there shall first be deducted the sum of \$23,991.23, known as the Nebraska City fund, and the further sum of \$25,708.54, known as the Central States Electric Company fund, and for expenses, including estimated expenses and services by certain utilities, and which, adding all items to be deducted, is the sum of \$404,134.91.

It is further ordered that checks be drawn on the First National Bank of Chicago, where the money is deposited, by the Clerk of this court under order of this court, for the amount to which each customer is entitled, based upon his [fol. 132] gas payments during the period covered by the overcharge, and the amount of the refund after deduction of the aforesaid sum of \$404,134.91.

It is further ordered that this distribution shall not constitute an approval of the charges made by the various utilities for current estimate of refund expenses; that this court will, on hearing, fix the amounts which shall be allowed to the utilities who have rendered services or incurred expenses in making this refund. But, in order that the amount due

each customer may be determined and payment promptly made, the sum total of all deductions, including the Nebraska City item and the Central States Electric Company item, is \$404,134.91.

It is further ordered that upon the payment of the checks by the First National Bank of Chicago to the refundees, Mr. Gregory shall immediately report to this court the number of customers who did not claim their refund and the total amount uncalled for, if any.

It is further ordered that the mailing of checks which are to be sent to the distributees shall begin on or before February 1, 1943.

It is further ordered that all refund checks bear the facsimile signature of the Clerk of this court in the following form:

Kenneth J. Carrick, Clerk of the U. S. Circuit Court
of Appeals for the Seventh Circuit.

January 22, 1943.

Evan A. Evans, William M. Sparks, Otto Kerner,
United States Circuit Judges.

[fol. 133] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents,

CENTRAL POWER COMPANY and CONSUMERS PUBLIC POWER
DISTRICT, Intervenor

STIPULATION—Filed June 7, 1943

It is hereby stipulated by and between the Intervenor, Central Power Company and Consumers Public Power District, and the City of Nebraska City, a Municipal Corporation in Otece County, Nebraska, that the issues presented by the original petition in intervention and the supplemental

petition in intervention of said Intervenor be settled, compromised and disposed of in the following manner:

1. That the Court be order, to be entered herein, direct the Clerk of said Court, or such other officer as may be designated by the Court to pay to the Intervenor and the City of Nebraska City from the fund heretofore segregated herein and designated as "City of Nebraska City Fund" in the amount of \$23,991.23, as follows:

Intervenor Central Power Company	\$3,002.30
Intervenor Consumers Public Power District	\$4,405.75
Ethel Gaskill, City Clerk-Treasurer of the City of Nebraska City, Nebraska, to be disposed of as may be hereafter determined by the City Council of said City of Nebraska City, Nebraska, the said City Council being the regulatory body for rates of Public Utilities in the said City	\$16,583.18

[fols. 134-135] 2. It is further stipulated and agreed between said intervenors and said City of Nebraska City that the proportionate share of expenses due the Clerk of said Court, if any, be deducted from the items above set forth to be paid to said respective parties.

3. It is further stipulated and agreed between the parties hereto that the said Intervenor waive all claim against said fund for expenses incurred by them and for attorneys fees.

4. It is further stipulated by and between the parties hereto, that the said Circuit Court of Appeals enter an order on this stipulation without further notice as to any of the parties hereto, said parties being the only interested parties in said fund.

5. This stipulation is made and entered into on behalf of the Intervenor Consumers Public Power District, by V. M. Johnson, Its General Manager, and by Lloyd E. Peterson, Its Attorney, and on behalf of said Intervenor Central Power Company, by Lloyd E. Peterson, Its Attorney, and on behalf of City of Nebraska City by the Mayor of said City whose signature is attested by the City Clerk, pursuant to resolution heretofore unanimously adopted by the Mayor and City Council of said City of Nebraska City, and approved as to sufficiency and form by John M. Dierks,

the duly appointed, qualified and acting City Attorney for said City of Nebraska City.

Dated at Nebraska City, Nebraska, this 17th day of May, 1943.

Central Power Company, Intervenor, by (Signed) Lloyd E. Peterson, Its Attorney. Consumers Public Power District, Intervenor, by (Signed) V. M. Johnson and by (Signed) Lloyd E. Peterson, Its Attorney-. City of Nebraska City, Nebraska, a Municipal Corporation, by (Signed) Wes Grail, Mayor.

Approved as to sufficiency and form on behalf of said City of Nebraska City, a Municipal Corporation.

(Signed) John M. Dierks, City Attorney of Nebraska City, Nebraska.

Attest: (Signed) Ethel Gaskief, City Clerk of Nebraska City, Nebraska.

[File endorsement omitted.]

[fol. 136] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents,

CENTRAL POWER COMPANY and CONSUMERS PUBLIC POWER
DISTRICT, Intervenor

ORDER PURSUANT TO STIPULATION—June 7, 1943

On this 7th day of June, 1943, this cause came on for hearing upon the stipulation of the Intervenor Central Power Company and Consumers Public Power District and of the City of Nebraska City, a Municipal Corporation, in Otoe County, Nebraska, which said stipulation has heretofore been filed herein, and upon due consideration of the terms of said stipulation the Court finds that said stipulation should be allowed and confirmed by the Court.

It Is, Therefore, Considered, Ordered, Adjudged and Decreed by the Court that there be paid from the fund designated herein as "City of Nebraska City Fund" and to the following named parties, as follows, to-wit:

Central Power Company	\$3,002.30
Consumers Public Power District	4,405.75
Ethel Gaskill, City Clerk-Treasurer of the City of Nebraska City, Nebraska	16,583.18

It Is Further, Considered, Ordered, Adjudged and Decreed by the Court that said amounts first have deducted therefrom the proportionate share of expenses due the clerk of this court; that parts II and III of the Supplemental Petition in Intervention of said Intervenors be and the same is hereby denied; and that the Intervenors be and hereby are denied allowances by this Court for expenses and attorneys' fees incurred by them herein.

[fols. 137-138] It Is Further Ordered by the Court that said disbursements be made forthwith by ———, the officer of this Court having said fund in custody and control.

June 7, 1943.

By the Court, Evan A. Evans, William M. Sparks,
Otto Kerner, Judges.

Approved for Entry:

Lloyd E. Peterson, Attorney for Intervenors, June
5, 1943.

John M. Dierks, Attorney for City of Nebraska City,
Nebraska, June 5, 1943.

[fol. 139] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION,
Respondents

MOTION FOR LEAVE TO INTERVENE—Filed September 1, 1943

Now comes Central States Electric Company, by Perry M. Chadwick and Dayton Ogden, its attorneys, and moves the

court for leave to file its intervention herein, for the purpose of seeking payment to it of the so-called "Central States Electric Company Fund."

Perry M. Chadwick, Dayton Ogden, Attorneys for
Central States Electric Company, an Iowa Corporation.

Chapman and Cutler, of Counsel.

[fols.-140-141] [File endorsement omitted.]

[fol. 142] IN THE UNITED STATES CIRCUIT COURT OF AP-
PEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COM-
MISSION, Respondents

PETITION IN INTERVENTION OF CENTRAL STATES ELECTRIC
COMPANY—Filed September 1, 1943

The undersigned intervenor, Central States Electric Company, as grounds and reasons for payment to it of \$25,708.54 now held by the Clerk of this Court, sometimes designated "Central States Electric Company Fund", respectfully shows:

1. Said sum of \$25,708.54 is the portion of the refund made by Natural Gas Pipeline Company of America, allocated to this intervenor as the extent of the overcharge paid by it to Natural Gas Pipeline Company of America for gas purchased from the latter during the refund period heretofore fixed.

2. Intervenor is a corporation organized under the laws of the State of Iowa, incorporated April 10, 1915, and since then has been continuously engaged in the utility business in the State of Iowa and elsewhere.

3. Intervenor has not heretofore been a party to this cause or the proceedings before the Federal Power Com-

mission wherein this cause originated and has not heretofore participated, directly or indirectly therein.

[fol. 143] 4. Intervenor's utility operations in Iowa are not regulated or controlled by any state agency or commission. By law in Iowa each city and town has power to regulate and fix the rates for gas service in the municipality. In practice each municipality and the utility serving it negotiate on the matter of rates, rate classifications, and service, and the like, without any outside control or regulation. Throughout intervenor's many years of gas utility operations in Iowa reductions have been made from time to time in its rates and charges and in its rate classifications, nearly all of which were initiated or voluntarily proposed by intervenor. This policy of intervenor has proved to be sound and to be advantageous both to intervenor and to the communities it serves. The prosperity and well being of intervenor depend upon a large volume of sales at reasonable prices, rather than a limited volume at higher prices.

5. Because of the absence of any statewide control or regulation, no uniformity prevails in Iowa communities as to rates, rate classifications, or service regulations. Wide variations occur between different municipalities of comparable size and location in these respects.

6. The use of gas, either natural or artificial, is much less extensive throughout Iowa, and particularly in the moderate sized communities served by intervenor than in metropolitan areas. The number of customers, both domestic and otherwise, in ratio to population is very much smaller than generally prevails to the east of the territory served by intervenor. The investment of Iowa utilities in gas properties is much higher per customer than generally prevails. The consumers of gas in the territory include very few who use such service for industrial or large space heating purposes.

7. Throughout the refund period and for some time prior thereto gas purchased by this intervenor from Natural Gas [fol. 144] Pipeline Company of America was distributed in four Iowa municipalities as follows:

(a) Muscatine, Iowa, population 18,286, with 2,432 gas customers. Such natural gas is distributed by Iowa Electric Company, which owns and operates the gas utility system in Muscatine, and which purchases the natural gas from this intervenor. Each of the sev-

eral contracts made by this intervenor to Natural Gas Pipeline Company of America for the purchase of natural gas expressly provided and contemplated that the gas, or a large portion thereof purchased by this intervenor, was intended to be re-sold by it to Iowa Electric Company for distribution by the latter in Muscatine. Sales of such gas by intervenor to Iowa Electric Company were made at the contract rates and without profit or advantage to the intervenor. More than 81% of the natural gas purchased by intervenor from Natural Gas Pipeline Company of America was thus re-sold to Iowa Electric Company and distributed by it in Muscatine.

Intervenor and said Iowa Electric Company are independent corporations having no direct corporate relationship, although each to some extent has the same personnel in charge of its management and operations. Facts and details herein related deal particularly with the larger operations at Muscatine rather than the smaller and scattered retail gas distributions by intervenor wholly on its own behalf.

Appended hereto, marked "Exhibit 1", is a counterpart of a letter addressed to intervenor by Iowa Electric Company, evidencing the latter's relinquishment of claim to said fund, or any part thereof, and consenting to the prosecution of this application by this intervenor.

(b) A portion of such purchased natural gas was distributed by intervenor over its own distribution system at Greenfield, Iowa, population 1,869, with 320 gas customers.

(c) The remainder of the gas purchased by intervenor was mixed with artificial gas produced by intervenor and retailed at Knoxville, Iowa, population 6,936, with 597 gas customers; and at Pella, Iowa, population 3,638, having 366 gas customers. The mixture of natural gas with artificial gas distributed by intervenor in these last two named communities contained less than 12½% of natural gas.

The statements as to population of the four municipalities mentioned in this paragraph are 1940 federal census figures as reported in the current Rand-McNally atlas. The number of gas customers in each are taken from the records of

intervenor and Iowa Electric Company as of December 31, 1941. Such numbers, both as to population and gas customers, were approximately the same throughout the entire refund period.

[fol. 145] 8. Natural gas was first furnished to intervenor by Natural Gas Pipeline Company of America late in 1932. It was realized from the outset that the greatly increased BTU content of natural gas required adjustment of all gas burners and appliances. Many such appliances required replacement, largely at the utility's expense. The inherent differences between natural gas and artificial gas, both as to the chemical composition and physical properties, were not at the time fully appreciated. After the conversion was accomplished, the excessive dryness of natural gas as compared with artificial gas brought in acute operating problems, principally the matter of leakage and metering difficulties. Loss of small quantities of gas by leakage from mains is a normal experience in the industry, and such leakage prior to the conversion of natural gas was within commonly recognized reasonable limits, not exceeding 10%. Since the introduction of natural gas, particularly at Muscatine, Iowa, such leakage has progressively increased so that during the refund period approximately 25% of the natural gas purchased was lost in this manner. The cause of this excessive leakage is the dryness of the natural gas which absorbed the natural residuum deposited by artificial gas in the mains and joints. In the metering equipment the diaphragms used in gas meters dried out to the extent that they required replacement. These conditions, particularly leakage, still prevail despite repairs and changes to the limit of the utility's resources, handicapped further in recent years by difficulty in obtaining requisite materials and labor. 2

9. Intervenor's earlier experience with natural gas soon demonstrated that the cost of the natural gas was excessive. Throughout the refund period such cost of natural gas was in excess of 48% of the total gas revenues of the larger distribution unit, Muscatine. This cost, at wholesale, was grossly excessive compared with other Iowa cities of comparable size and location. When other necessary expenses were added, including operation and maintenance charges, administrative overhead, depreciation, and the like, only a nominal balance remained as a return on the substantial investment in the property. Shortly after the

conversion of the properties to natural gas, intervenor made known to Natural Gas Pipeline Company of America its difficulties, and the unreasonable burden imposed by the rates specified in its initial gas purchase contract made in 1931. Thereafter several supplemental agreements were made, including a so-called "Boiler Fuel Gas Contract," dated August 25, 1936, a so-called "50¢ Gas Sales Contract," dated August 25, 1936, and a so-called "Industrial Processing Gas Contract," dated November 1, 1937. These supplemental agreements, however, were of a nature designed for metropolitan centers containing large individual users of gas and were of very little benefit or advantage to intervenor or to the Muscatine, Iowa operations, where costs until the recent readjustments remained excessively high.

10. In keeping with the policy of established utilities in Iowa voluntarily to reduce rates from time to time, new schedules of Muscatine, Iowa, have been frequently proposed for natural gas service. The first of these was on July 9, 1932. It generally prevailed until August, 1936, when a further reclassification and a rate reduction, save in the first bracket, was fixed. Subsequently to August, 1936, further changes and reductions were made from time to time and were approved by resolution of Muscatine City Council, but no official record of such latter changes can now be found until the current rate ordinance enacted February 4, 1943. Copies of the rate schedules in each of these three revisions are appended hereto, marked "Exhibit 2". Each was in substance as voluntarily proposed and offered, and each was enacted by ordinance of the City Council of Muscatine.

[fol. 147] 11. There is appended hereto a summary of the revenues and expenses of the Muscatine, Iowa, gas property, for the calendar years 1933 to 1941, inclusive, marked "Exhibit 3." The figures there shown are those used for the company's own accounting purposes and in the preparation of its federal income tax returns and reports to other governmental bodies. The net revenue throughout the refund period, after depreciation, is less than \$6,000 per year.

The cost of the Muscatine gas property as of January 1, 1933, was	\$523,895.91
Up to December 31, 1941, this cost plus additions to the properties during the period and minus depreciation and retirement charges was reduced to	361,610.18

The return on this amount, actually and necessarily invested in the property, was less than 2% per annum throughout the refund period and the entire period of natural gas operation up to the latest rate revisions made within the past year.

Intervenor submits that the facts herein related, which intervenor is prepared fully to establish by competent proofs, warrant and require the entry of an order directing payment by the Clerk of this Court to this intervenor of the so-called Central States Electric Company fund.

Central States Electric Company, Intervenor, by
Percy M. Chadwick, Dayton Ogden, Its Attorneys.

Chapman and Cutler, of Counsel.

[fol. 148] *Duly sworn to by Frank A. Fratcher. Jurec
omitted in printing.*

[fol. 149]

EXHIBIT 1

Copy

Iowa Electric Company

General Office

Cedar Rapids, Iowa

August 28, 1943

Central States Electric Company, Cedar Rapids, Iowa.

GENTLEMEN:

Confirming the assurances heretofore expressed to you by the management of the undersigned, be advised that the undersigned has relinquished and waived any claim which the undersigned may have for payment to the undersigned by the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit of any part of the so-called natural gas refund moneys of which we understand some \$25,000 has been at least nominally allocated to you.

The undersigned consents that you make application for the payment to you of such refund moneys, claiming the same in your own right. In your application you may freely use whatever pertinent or useful data may be afforded by

the accounting or other records of the undersigned, including gas utility property costs and values, operating figures, and rates and rate classifications.

The consent and relinquishment hereby confirmed has been in substance approved by the board of directors of the undersigned.

Yours very truly Iowa Electric Company, by
(Signed) Ray Ingham, Vice President.

[fol. 150]

EXHIBIT 2

Summary of Gas Rates Prescribed by Ordinance in the City of Muscatine, Iowa, from 1932 to 1943

By ordinance passed, approved and adopted July 9, 1932—

For Domestic use:

	0 Cubic Feet per month	\$.75
	100 Cubic Feet per month	.75
	200 Cubic Feet per month	.75
	300 Cubic Feet per month	.84
	400 Cubic Feet per month	1.12
	500 Cubic Feet per month	1.40
	600 Cubic Feet per month	1.68
	700 Cubic Feet per month	1.96
	800 Cubic Feet per month	2.24
	900 Cubic Feet per month	2.52
	1000 Cubic Feet per month	2.80
First	1500 Cubic Feet per month	2.80 per M.
Next	1500 Cubic Feet per month	2.55 per M.
Next	2000 Cubic Feet per month	2.36 per M.
Next	20000 Cubic Feet per month	2.19 per M.
Next	26500 Cubic Feet per month	1.92 per M.
	Balance	1.75 per M.

For Industrial use:

First	500 Cubic Feet per month	\$3.33 per M.
Next	500 Cubic Feet per month	3.22 per M.
Next	1000 Cubic Feet per month	2.78 per M.
Next	8000 Cubic Feet per month	1.67 per M.
Next	10000 Cubic Feet per month	1.45 per M.
Next	30000 Cubic Feet per month	1.33 per M.
Next	50000 Cubic Feet per month	1.11 per M.
	Balance	.78 per M.

The minimum bill for industrial use per month shall be \$15.00.

The rates to be charged for natural gas for space heating shall not be in excess of Eighty Three Cents (83¢) per thousand cubic feet with a minimum bill of Five Dollars (\$5.00) per month for the months of October, November, December, January, February, and March.

Every consumer shall have the right to a discount from the above rates of ten per cent (10%) for prompt payment within ten days (10) after the bill is rendered.

The minimum bill shall be seventy-five cents (75¢) per month per meter for domestic use.

[fol. 151] By ordinance passed, approved and adopted August 6, 1936—

	0 Cubic Feet Per Month	\$.75
	100 Cubic Feet Per Month	\$.75
	200 Cubic Feet Per Month	.75
First	300 Cubic Feet Per Month	.75
Next	1200 Cubic Feet Per Month	2.25 per M.
Next	1500 Cubic Feet Per Month	1.50 per M.
Next	37000 Cubic Feet Per Month	.70 per M.
Next	160000 Cubic Feet Per Month	.60 per M.
Balance		.40 per M.

The rates to be charged for natural gas for space heating shall not be in excess of eighty-three cents (83¢) per thousand cubic feet, with a minimum bill of five dollars (\$5.00) per month for the months of October, November, December, January, February and March.

All of the above rates and charges are net and the net bill shall be due and payable within ten (10) days after rendition. On all bills not paid within ten (10) days after rendition, the net amount shall be increased 10% on the first \$10.00 and 2% on the balance, and the gross so determined shall be due and payable.

The minimum bill shall be seventy-five cents (75¢) per month per meter for domestic use.

The minimum bill for industrial use per month shall be fifteen dollars (\$15.00).

By ordinance passed, approved and adopted February 4, 1943—

Residence Gas Service Rate:

The first 300 cubic feet or less used per month for \$0.75.

The next 1,200 cubic feet used per month at \$1.90 per MCF.

The next 1,500 cubic feet used per month at \$1.20 per MCF.

The next 197,000 cubic feet used per month at \$0.50 per MCF.

The balance cubic feet used per month at \$0.40 per MCF.

Minimum monthly bill \$0.75.

Commercial Gas Service Rate:

The first 300 cubic feet or less used per month for \$0.75.

The next 1,200 cubic feet used per month at \$2.00 per MCF.

The next 1,500 cubic feet used per month at \$1.20 per MCF.

The next 37,000 cubic feet used per month at \$0.60 per MCF.

The next 160,000 cubic feet used per month at \$0.50 per MCF.

The balance cubic feet used per month at \$0.40 per MCF.

Minimum monthly bill \$0.75.

All of the above rates and charges are net and the net bills shall be due and payable within ten days after rendition. On all bills not paid within ten days after rendition, the net amount shall be increased 10% on the first \$10.00 and 2% on the balance, and the gross bills so determined shall be due and payable.

(Here follows, 1 paster, folios 152-153)



[fol. 154] IN UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, Petitioners,

vs.

FEDERAL POWER COMMISSION, et al., Respondents

ORDER GRANTING LEAVE TO INTERVENE—September 1, 1943

On motion of counsel for Central States Electric Company, it is ordered that leave be granted to Central States Electric Company to file in this Court instanter its "Intervention" and also be granted leave to intervene in this cause.

[fol. 155] IN UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE GAS COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE
COMMISSION, Respondents

ORDER AS TO NOTICE OF APPLICATION FOR LEAVE TO INTERVENE
—November 6, 1943

The application of Central States Electric Company for leave to intervene and to claim the \$25,708.54, heretofore separated from the total fund deposited with this Court, and ordered to be separately dealt with, coming on to be heard, and the Court being advised in the premises and being of the opinion that parties should be notified of such application and given the opportunity to oppose it or consent to an order granting applicant's prayer for relief.

It is ordered that notice of such application be given to the Attorney General of the State of Iowa, to the municipality and the Mayor and the City Attorney of Muscatine, Iowa, and the municipality and the Mayor and City Attorney of Greenfield, Iowa, and to all customers of Central States Electric Company who received distribution of gas

from that company at Muscatine, Iowa or Greenfield, Iowa, between August 1, 1940 and March 31, 1942. Such notice shall be given by the Clerk who shall send by mail a copy of this order to each of the aforesaid parties except the customers of Central States Electric Company, and also by publishing a copy thereof three times in the Muscatine Journal, a newspaper published at Muscatine, Iowa, and in the Adair County Free Press, a newspaper published at Greenfield, Iowa.

It is further ordered that said respondents, the City of Muscatine, Iowa, the City of Greenfield, Iowa, and the customers of Central States Electric Company, on or before December 1, 1943, show cause, if any they have, why the relief sought by Central States Electric Company, should [fol. 156] not be granted.

It is further ordered that any of the parties herein named, may appear in writing instead of in person, and the Court will make such order for the date of hearing as may be just and fair to all parties.

By the Court:

_____, Clerk.

[fol. 157] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COM-
MISSION, Respondents

CENTRAL STATES ELECTRIC COMPANY, Intervenor,

CITY OF MUSCATINE, IOWA, Respondent

RESISTANCE OF CITY OF MUSCATINE, IOWA, TO APPLICATION AND
INTERVENTION OF CENTRAL STATES ELECTRIC COMPANY—
Filed December 1, 1943

The undersigned respondent, City of Muscatine, Iowa, appearing for itself and in behalf of the customers of Iowa Electric Company, assignor of intervenor, Central States Electric Company, in said City of Muscatine, pursuant to

the order entered by the Court herein on November 6, 1943, in response to the intervention filed by said Central States Electric Company and as cause why the application of said intervenor should not be granted, respectfully shows to the Court:

1. That it is a municipal corporation organized under the laws of the State of Iowa and acting under special charter granted by the Legislature of said State, with full power and authority to grant franchises to individuals or private corporations for the construction, operation and maintenance of gas works and other utilities; that during the so-called "refund period", from August 1, 1940, to March 31, 1942, and both prior and subsequent thereto, the Iowa Electric Company, intervenor's assignor, was furnishing gas service to the citizens of the City of Muscatine, Iowa, [foi. 158] under a franchise granted to it, the rates for such gas service having been fixed by agreement with said Iowa Electric Company and approved by ordinance adopted by the City Council of this respondent from time to time during the existence of said franchise. Exhibit 2, attached to the petition of intervention of said Central States Electric Company, correctly states the gas rates as fixed by ordinances adopted at various dates between July 9, 1932, and February 4, 1943, but this respondent states that with the exception of minor changes in one or two specific rates, all negotiations for a change in gas rates to the consumers in the City of Muscatine were initiated by this respondent acting through its duly authorized officers, and that any substantial reductions in the rates at which such service was rendered to the citizens of Muscatine, were only made after prolonged negotiations initiated by this respondent and substantially no reduction in rates has ever been granted voluntarily by said utility to its customers in the City of Muscatine.

2. This respondent further states that it has not heretofore been made a party to this suit, nor was it advised by the representatives of the Iowa Electric Company at any time during the negotiations resulting in a modification of the rates charged to gas customers of said utility in the City of Muscatine, which were embodied in the ordinance adopted by the City Council of the City of Muscatine on February 4, 1943, that under the orders and decrees theretofore entered in this cause, the cost of the natural gas purchased

by it from the intervenor and resold by it to the residents of the City of Muscatine, had been sharply reduced, or that under the decree of this Court entered on September 3, 1942, the sum of \$25,708.54 had been set apart as a refund to be paid to the customers of said gas utility in the City of Muscatine, Iowa, and the City of Greenfield, Iowa; that in [fol. 159] none of such negotiations did the representatives of said Iowa Electric Company, intervenor's assignor, present all of the facts involved to the officials of this respondent who were negotiating with it for a reduction of the gas rates to be paid by the citizens of Muscatine, and respondent therefore avers that said intervenor should not now be heard by this Court in its attempt to have diverted to it the fund which the Court has heretofore found should of right be repaid to the customers of said utility to reimburse them for the excessive rates charged and collected by said Iowa Electric Company during the refund period.

3. Respondent further shows to the Court that it appears herein primarily in behalf of the gas customers served by the Iowa Electric Company, intervenor's assignor, in the City of Muscatine, for the reason that said customers consist of more than 2400 individuals, firms and corporations, whose names are unknown to this respondent, or to each other, and whose individual interests in said refund are quite small, and they are, therefore, unable to appear herein or to enter a resistance in their own behalf against the intervention and claim of said Central States Electric Company.

4. This respondent avers that so far as it is advised, none of said gas customers had any knowledge or information with respect to the pendency of this suit or the orders or decrees entered by the Court, providing for a reduction in the price to be paid by said intervenor to the petitioner Natural Gas Pipeline Company of America for gas purchased by it and resold to the Iowa Electric Company for sale and distribution to the residents of the City of Muscatine, nor of the provisions of the order and decree entered by the Court on September 3, 1943, providing for the refund of \$25,708.54 to be repaid to such customers in the City of Muscatine and *and* to the gas customers of intervenor in the City of Greenfield, Iowa.

[fol. 160] 5. In response to the matters alleged by intervenor in paragraphs 8 and 9 of its intervention, this re-

spondent denies that the percentage of leakage from the mains of the distribution system owned by intervenor's assignor, Iowa Electric Company, in the City of Muscatine, Iowa, arising from the use of natural gas, as distinguished from water gas, is approximately 25% of the natural gas purchased; and while it is true that the percentage of natural gas lost by leakage in the mains is somewhat larger than in the case of water gas, the amount of such leakage is very much less than 25%; that it was well known to the intervenor and its assignor, before entering into the contract for the purchase of natural gas from the Natural Gas Pipeline Company of America, that there would be a larger percentage of leakage, since the said intervenor was by no means a pioneer in the distribution of natural gas to retain consumers, and records of the experience of other utilities in the distribution of such natural gas and the amount of leakage arising therefrom, for many years prior to the date of such contract, were available to intervenor's engineers. Moreover, respondent is informed and believes and so avers, that much of the leakage of which intervenor complains was the result of deterioration in its distribution system which had been in use for a long period of years before the contract for the use of natural gas was entered into; that said utility had at all times set up the necessary reserves for the depreciation of its distribution system and charged the same from year to year as part of the cost of operating said system in the City of Muscatine, so that any repairs or alterations which may have been necessary, as alleged by intervenor, to prevent such leakage, cannot now be asserted by it as ground for claiming the refund set apart by the Court for the benefit of the customers of intervenor's assignor.

[fol. 161] 6. In response to paragraph 11 of said intervention, this respondent denies that the net revenues earned by intervenor's assignor, the Iowa Electric Company, from its sales of gas to its customers in the City of Muscatine throughout the refund period was less than \$6000.00 per year, and that the return on the depreciated value of the Muscatine gas property owned by said assignor, Iowa Electric Company, as set forth in paragraph 11, was less than 2% per annum throughout the refund period and the entire period of gas operation up to the last rate revisions made

within the past year; and it further specifically denies that Exhibit 3 attached to said intervention and purporting to be a summary of gas revenues and expenses of Iowa Electric Company at Muscatine, Iowa, for the years 1933 to 1942 inclusive, is a true and correct statement of such revenues and expenses, or that the "net revenue after depreciation" and the "per cent return on investment" for each year, as set forth in said summary, correctly reflects the actual net return received by said Iowa Electric Company from the operation of its distribution system in the City of Muscatine, and further denies that the item of distribution service expense shown in said summary for each of said years is correct, but avers the fact to be that the distribution service expense properly chargeable to the operation of said Muscatine gas property is far less than the figures stated in said summary and that when said figures, as well as other items of expenses set forth in said summary, are corrected to show the actual cost of operating the Muscatine gas property the net revenue therefrom will in each of said years be far in excess of the amount shown in said summary.

[fol. 162] 7. This respondent denies that the matters alleged in the petition of intervention filed herein by the said Central States Electric Company as assignee of the Iowa Electric Company, insofar as the same relate to the operation of the Muscatine gas property and the rates charged to customers thereof in the City of Muscatine, are material or competent to support its claim for payment to it of the refund set apart under the decree of this Court for payment to the customers of said intervenor in the City of Muscatine and the City of Greenfield, Iowa, and that the showing made in said petition of intervention is wholly insufficient to justify the Court in setting aside the orders and decrees heretofore entered by it in this cause with respect to said fund.

8. This respondent states that the intervention of said Central States Electric Company and its claim for the payment to it of the refund in question, are based in general upon its assertion that, (a) there is excessive leakage of natural gas from its mains resulting in a higher cost of the gas actually sold, and (b) the alleged inadequate net return upon the capital invested in its Muscatine gas property, and in support of the second proposition it attaches to its petition Exhibit 3 alleged to be a summary of gas revenues

and expenses in the operation of the Muscatine, Iowa, property from 1933 to 1941 inclusive. As heretofore stated, this respondent and the customers of said intervenor and its assignor, Iowa Electric Company, in the City of Muscatine, have not been parties to this litigation and have not been advised as to the claim made by the Central States Electric Company until the service upon its mayor and city attorney of the copy of the order entered by this Court on November 6, 1943, requiring respondent and the customers of said intervenor to show cause on or before December 1, 1943, why [fol. 163] the relief sought by said Central States Electric Company should be granted. It is self evident that the contentions of the intervenor present many very technical propositions which will require expert research to meet and this respondent has not had the opportunity, since the service of notice of said intervention upon it, to make the necessary investigations which would enable it to properly present the defense of the customers of said intervenor and its assignor, to said petition of intervention and claim, and that to do so will require a considerable amount of time, and not less than sixty days from December 1, 1943.

Wherefore this respondent respectfully prays that this Court may grant respondent additional time within which to prepare a proper showing to meet the intervention and claim of said Central States Electric Company and submit the same to this Court, and that upon final hearing said petition of intervention and application for the payment of said fund to said Central States Electric Company be denied and said intervention dismissed.

City of Muscatine, Iowa, by R. E. Dunker, Mayor.

[fol. 164] *Duly sworn to by R. E. Dunker. Jurat omitted in printing.*

[fol. 154a] [File endorsement omitted]

[fol. 165] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
No. 7454

[Title omitted]

AFFIDAVIT OF SERVICE—Filed December 1, 1943

STATE OF IOWA,

Muscatine County, ss:

I, Matthew Westrate, being first duly sworn, on oath state that I am City Attorney of the City of Muscatine, Iowa, respondent to the Petition of intervention filed in the above entitled cause by Central States Electric Company; that on the 29th day of November, 1943, I mailed a copy of the Resistance of the City of Muscatine to Application and Intervention of Central States Electric Company to Mr. Dayton Ogden, one of the attorneys of record for Central States Electric Company, Intervenor, at No. 111 West Monroe Street, in the City of Chicago, Illinois.

(Signed) Matthew Westrate.

Subscribed and sworn to before me by the said Matthew Westrate this 29th day of November, 1943.

(Signed) Mary Prosser, Notary Public, Muscatine County, Iowa. (Seal.)

[File endorsement omitted.]

[fol. 166] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER
COMMISSION, Respondents

RESISTANCE OF NATURAL GAS USERS OF THE TOWN OF GREEN-
FIELD TO INTERVENTION—Filed December 1, 1943

Comes now, Elmer E. Johnson and for himself and for
the Natural Gas Users of the town of Greenfield, Adair

County, Iowa, and respectfully states to the court in resistance of the petition of intervention filed by Central States Electric Company:

1. That he is at this time Mayor of the town of Greenfield; that he is also at this time and was during the period covered by the above entitled action a user of natural gas sold by the Central States Electric Company in the town of Greenfield and he makes this resistance for himself and for the other users of said gas in said town of Greenfield.

2. That the original findings of fact and conclusions of law and decree filed in the above title cause of action in the October term for 1941 show in said decree by the court and that the various ultimate users and not the utilities are entitled to said money.

3. That said utilities among which is the Central States Electric Company bought said gas of the Natural Gas Pipeline Company, petitioners, in this action and knew when they bought it what it would cost them; that they then sold gas to their customers, the ultimate users, in the town of Greenfield at a rate that they thought would pay them the profit that they were entitled to, that they have received all the pay for said gas that they intended to get when they sold it; that they paid more for said gas than they should, have already collected for same from the ultimate consumers and any rebate now due should belong to the ultimate consumers of said gas.

[fol. 167] Wherefore he asks for himself and for the other ultimate consumers of said gas as defined in said decree be declared the owners of said funds; that the court redirect distribution of said funds as originally ordered in said decree; that the petition of intervention of Central States Electric Company be dismissed at their costs; and for all else in said matter as to the court appears just and proper.

Elmer E. Johnson, for Himself. Elmer E. Johnson,
for Gas Users of Town of Greenfield, Iowa.

Duly sworn to by Elmer E. Johnson. Jurat omitted in printing.

[fol. 168] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

[Title omitted]

AFFIDAVIT OF SERVICE—Filed December 7, 1943

STATE OF IOWA,

Adair County, ss.

I, Elmer E. Johnson, being first duly sworn, depose and say that on the 3rd day of December, 1943, I did place in the mails of Greenfield, Iowa, a letter with sufficient postage attached, in which letter was contained a copy of the Resistance filed by me for myself and for the other users of Natural Gas in the Town of Greenfield, Iowa, to the Petition of Intervention filed in the above entitled cause of action by the Central States Electric Company; that said letter was addressed to Mr. Dayton Ogden, Attorney at Law, 111 W. Monroe Street, Chicago, Illinois Resistance was filed by me in said Cause of Action on December 1, 1943.

(Signed) Elmer E. Johnson.

Subscribed and sworn to before me this 4th day of December, 1943. (Signed) A. L. Murphy, Clerk District Court of Adair County, Iowa, by Blanche L. Fagan, Deputy. (Seal.)

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

.

AFFIDAVIT RE PROOF OF PUBLICATION—Filed December 7, 1943

STATE OF IOWA,

Adair County, ss.

[fol. 169] I, K. H. Sidey, being first duly sworn, on oath depose and say that I am the editor and publisher of the Adair County Free Press, a weekly newspaper of general circulation in said county, and regularly printed and published in the English language at Greenfield, Adair County,

Iowa; that the annexed Intervention Order Notice was printed and published, once each week in said newspaper for 3 consecutive weeks, and that the first of said publications was on November 11, 1943, the second on November 18, 1943, and the third on November 25, 1943.

(Signed) K. H. Sidey.

Subscribed in my presence and sworn to before me by the said K. H. Sidey on this 2nd. day of December A. D., 1943. (Signed) A. L. Murphy, Clerk Dist. Court in and for Adair County, Iowa, by Blanche L. Fagan, Deputy. (Seal.)

Printers Fee \$16.00.

Copy of the Order of November 6th, 1943, attached.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

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AFFIDAVIT RE PROOF OF PUBLICATION—Filed December 7, 1943

C. Lloyd Bunker, Business Manager of the Muscatine Journal and News-Tribune, a newspaper printed and published at Muscatine, Muscatine County, Iowa, being first duly sworn, says that Notice in the case of Natural Gas Pipeline Co. of America and Texoma Natural Gas Co. vs. Federal Power Commission and Illinois Commerce Commission of which annexed printed slip is a true, correct and complete copy, was published in said The Muscatine Journal and News-Tribune once each week for Three weeks in succession, the first publication having been made there-in on November 8, 1943, the second on November 15, 1943, and the third on November 22, 1943.

(Signed) Lloyd Bunker.

Subscribed in my presence and sworn to before me by the said C. Lloyd Bunker this 23rd. day of November, 1943. (Signed) Edith M. Garnes, Notary Public in and for Muscatine County, Iowa. (Seal.)

Copy of Order of November 6, 1943, attached.

[File endorsement omitted.]

[fol. 170] IN UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al., Petitioners,

vs.

FEDERAL POWER COMMISSION, et al., Respondents

ORDER OF COMMISSION—February 3, 1944

Now this day this cause come on to be heard on the Intervention Petition of Central States Electric Company, and on oral argument by Mr. Dayton Ogden, counsel for Central States Electric Company, and by Mr. Matthew Westrate, City Attorney of Muscatine, Iowa, and the Court takes this matter under advisement.

[fol. 171] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS COMMERCE COMMISSION, Respondents

CENTRAL STATES ELECTRIC COMPANY, Intervenor,

CITY OF MUSCATINE, IOWA, Respondent

AMENDMENT TO RESISTANCE OF CITY OF MUSCATINE, IOWA, TO
APPLICATION AND INTERVENTION OF CENTRAL STATES ELECTRIC
COMPANY—Filed February 14, 1944

Comes now the respondent, City of Muscatine, Iowa, and with leave of Court amends its resistance to the application and intervention of Central States Electric Company heretofore filed in this cause, by adding thereto the following grounds, to-wit:

9. This respondent avers that the matters alleged in the intervention filed herein by said Central States Electric

Company as reasons why the fund in question should be paid to it, instead of being distributed to the gas customers of the utility in the cities of Muscatine, Iowa, and Greenfield, Iowa, as provided by the decree of this Court, are wholly incompetent, immaterial and irrelevant in this suit, and in effect, constitute an attempt by intervenor to have this Court adjudicate the validity of the gas rates in effect in the City of Muscatine during the "refund period" and for some years prior thereto; that it affirmatively appears from said intervention that the schedule of gas rates in effect in the City of Muscatine during the so-called "refund [fol. 172] period" as fixed by ordinances of the City of Muscatine, Iowa, were adopted by agreement between the City Council of said City of Muscatine and the Iowa Electric Company, assignor of said Central States Electric Company, which agreement was freely and voluntarily entered into by and between the parties. That the said Iowa Electric Company, as the operating gas utility in the City of Muscatine, and the City Council of the City of Muscatine, Iowa, were duly competent and qualified under the law, to enter into a voluntary agreement with respect to the gas rates to be paid by the citizens of Muscatine, and no objections to the sufficiency or adequacy of said rates to produce a fair return upon its investment or rate base was ever made by said utility after the adoption thereof, but on the contrary, as averred in said petition of intervention, the utility voluntarily reduced its gas rates in Muscatine from time to time between the years 1932 and 1943, during which period it was distributing natural gas purchased from The Natural Gas Pipeline Company of America to its customers in Muscatine, and by reason thereof, intervenor is estopped and cannot now be heard to claim that said gas rate schedules were inadequate or insufficient to produce a fair return upon its rate base.

10. This respondent further avers that the allegations contained in said petition of intervention do not set forth any valid or material ground or cause for which this Court should modify its decree entered herein on September 3, 1942, providing for the distribution of the fund in question to the customers of the gas utilities in the cities of Muscatine, Iowa, and Greenfield, Iowa, and that a consideration thereof by this Court for the purpose urged by intervenor

would involve jurisdictional questions and matters wholly immaterial and irrelevant under the terms of said decree.

[fol. 173] Wherefore, respondent prays as in its original Resistance filed herein, and that on final hearing said petition of intervention and application for the payment of said fund to said Central States Electric Company be denied and said intervention dismissed.

City of Muscatine, Iowa, by R. E. Dunker, Mayor,
Matthew Westrate, Attorney.

Duly sworn to by R. E. Dunker. Jurat omitted in printing.

[fol. 174] [File endorsement omitted.]

[fol. 175] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF SERVICE.—Filed February 14, 1944

STATE OF IOWA,

Muscatine County: SS:

I, Matthew Westrate, being first duly sworn, on oath state that I am City Attorney of the City of Muscatine, Iowa, respondent to the petition of intervention filed in the above entitled cause be Central States Electric Company; that on the 11th day of February, 1944, I mailed a copy of the Amendment to Resistance of the City of Muscatine, Iowa, to the application and intervention of Central States Electric Company, by registered mail, to Mr. Dayton Ogden, one of the attorneys of record for Central States Electric Company, intervenor, in care of Chapman & Cutler, at 111 West Monroe Street, in the City of Chicago, Illinois.

(Signed) Matthew Westrate.

Subscribed and sworn to before me by the said Matthew Westrate this 11th day of February, 1944.

(Signed) Mary Prosser, Notary Public, Muscatine
County, Iowa. (Seal.)

[File endorsement omitted.]

[fols. 176-177] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION,
Respondents

ORDER DENYING PETITION OF INTERVENOR—February 14,
1944

Before EVANS, SPARKS and KERNER, Circuit Judges:

The petition of intervenor, Central States Electric Company, for an order directing the Clerk of this Court to pay to it, the Central States Electric Company, the sum of \$25,708.54 coming on to be heard and the Court having given consideration to said petition, and it appearing that petitioner bases its prayer for relief on the ground that its gas rates are, and have been inadequate, and the reasonableness of petitioner's rates being a matter beyond the jurisdiction of this Court, and this Court having previously ruled that the refund made by National Gas Pipeline Company of America and Texoma Natural Gas Company belonged to the consumers of gas supplied by customers of said Natural Gas Pipeline Company of America and Texoma Natural Gas Company, and the Court deeming it is advisable in the premises, It is ordered, adjudged and decreed that the petition of the said intervenor, Central States Electric Company, be, and the same is hereby denied.

It is further ordered that this denial of intervenor's petition is without prejudice to its making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa, or with the consumers of gas furnished by it in said cities.

[fol. 178] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents

ORDER DIRECTING PAYMENT OF CENTRAL STATES ELECTRIC
CO. FUND TO CITY TREASURERS—February 14, 1944

Before EVANS, SPARKS, and KERNER, Circuit Judges.

The above entitled matter coming on to be heard and the parties being unable to stipulate or agree upon the facts or upon the rights of the parties,

And it appearing that the Natural Gas Pipeline Company of America and the Texoma Natural Gas Company have heretofore paid into this Court the sum of \$6,377,913.52, which has been in part distributed by the Clerk of the Court to the consumers of gas in the State of Illinois who are entitled to receive said refund;

And it appearing that a part of said refund belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa; and it appearing that the total amount which belongs to said consumers in said cities of the State of Iowa is \$25,708.54,

And there being no state commission in the State of Iowa, and the Central States Electric Company has heretofore filed a petition to intervene and to secure an order from this Court directing said moneys to be paid to it, and that said petition has been by this Court denied, but without prejudice to said Central States Electric Company's making claim for said moneys in the hands of the City Treasurers of the said cities, to which this money is to be paid;

And the Court being desirous of paying, at the earliest possible date, to such parties as are entitled to the same, and to permit of a determination of said rights by a Court or body having jurisdiction thereof, and deeming itself [fol. 179] duly advised in the premises,

It is ordered that the Clerk of this Court pay to the City Treasurer of the City of Muscatine the sum of \$20,823.

It is further ordered that the Clerk pay to the City Treasurer of the City of Greenfield, the sum of \$1,221.

It is furthered ordered that the Clerk pay to the City Treasurer of the City of Knoxville the sum of \$2,260.

It is furthered ordered that the clerk pay to the City of Pella, Iowa, the sum of \$1,403.

It is furthered ordered that the Clerk serve a copy of this order promptly upon the City Treasurers of said Cities of Muscatine, Greenfield, Knoxville, and Pella, and also on the Central States Electric Company and the Natural Gas Pipeline Company and the Texoma Natural Gas Company, and upon such representatives of said cities as have appeared, and that said service shall be by mailing a copy of the order to each of said parties.

It is further ordered that said payments by the Clerk shall not be made until thirty days from the date of such service, unless said Cities and said Central States Electric Company, in writing, consent to an immediate payment of said money to said City Treasurers.

It is further ordered that in case an appeal shall be taken from this order within thirty days that the Clerk of this Court is directed to suspend payment until the further order of this Court.

Dated: February 14, 1944.

Evan A. Evans, William M. Sparks, Otto Kerner,
Circuit Judges.

[fol. 180] IN UNITED STATES CIRCUIT COURT OF APPEALS

LETTER—Filed February 18, 1944

Chapman and Cutler
111 West Monroe Street
Chicago, 3, Illinois

February 17, 1944.

Clerk of the United States Circuit Court of Appeals for the
7th Circuit, 1212 Lake Shore Drive, Chicago, 10, Illinois.

DEAR SIR:

Re: Natural Gas Pipeline Company of America, et al., v.
Federal Power Commission, et al., Cause No. 7454

On behalf of Mr. Dayton Ogden, who is presently in California, we hereby acknowledge receipt of copies of two orders entered in the above entitled cause on December 14, 1944.

Our client, Central States Electric Company, is unwilling to consent to payment of the funds to the City Treasurers of the municipalities involved at this time, inasmuch as there has not been sufficient opportunity as yet to investigate the entire matter.

Yours very truly, (Signed) Chapman and Cutler.

[File endorsement omitted.]

[fol. 181] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

VS.

FEDERAL POWER COMMISSION and ILLINOIS POWER
COMMISSION, Respondents

MOTION OF CENTRAL STATES ELECTRIC COMPANY FOR LEAVE TO
FILE ITS SUPPLEMENTAL PETITION AND FOR A STAY OF A
CERTAIN ORDER ENTERED HEREIN ON FEBRUARY 14, 1944—
Filed March 11, 1944

Comes now *Central States Electric Company* and moves
the Court for the entry of an order providing as follows:

1. Granting leave to Central States Electric Company to
file herein instanter its Supplemental Petition which is at-
tached hereto.

2. Staying the order entered herein on February 14, 1944
(which, among other things, directs the Clerk of this Court,
as more fully set forth in said order, to pay to the Treas-
urers of the Cities of Muscatine, Greenfield, Knoxville and
Pella, Iowa, the sum of \$25,708.54) until the Court rules
on said Supplemental Petition, and in the event the prayer
of said petition is denied then staying said order for a
period of thirty days from and after the date of the order
of denial.

Central States Electric Company, by Perry M.
Chadwick, Dayton Ogden, Its Attorneys, 111 West
Monroe Street, Chicago, Illinois, Randolph 6130.

[fol. 182] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER
COMMISSION, Respondents

SUPPLEMENTAL PETITION OF CENTRAL STATES ELECTRIC
COMPANY—Filed March 28, 1944

Comes now *Central States Electric Company* and for a supplement to its intervening petition filed herein on September 1, 1943, and as additional grounds and reasons for payment to it of the sum of \$25,708.54 now held by the Clerk of this Court respectfully represents as follows:

1. On August 30, 1940, this Court entered an order in its Cause No. 7439, entitled "*Natural Gas Pipeline Company of America and Texoma Natural Gas Company, Petitioners, vs. Federal Power Commission and Illinois Commerce Commission, Respondents,*" staying the order of the Federal Power Commission dated July 23, 1940, which directed Natural Gas Pipeline Company of America to file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in its operating revenues, and in and by said order it is provided, among other things, as follows:

"That this order will become effective upon the execution and delivery to the Clerk of this Court by petitioners of their joint and several bond in the penal sum of \$1,000,000 *conditioned on their refunding to those who purchase natural gas from petitioners at wholesale* as their several interests appear, the amount represented by the reduction in revenues as directed by the Federal Power Commission in its order dated July 23, 1940, if the order last mentioned be sustained."

[fol. 183] Pursuant to the aforesaid order entered by this Court on August 30, 1940, and pursuant to orders entered in the above entitled cause on November 1, 1940, and November 26, 1940, Natural Gas Pipeline Company of America

and Texoma Natural Gas Company on December 3, 1940, filed herein their bond whereby they bound themselves to the Federal Power Commission and the Illinois Commerce Commission in the penal sum of \$1,000,000, the condition of which bond is as follows:

"The condition of this obligation is such that if the undersigned shall pay or cause to be paid to the purchasers at wholesale of natural gas from Natural Gas Pipeline Company of America as their several interests appear the amounts representing the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review of the order of the Federal Power Commission dated July 23, 1940, directing the undersigned, Natural Gas Pipeline Company of America, to file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of said Natural Gas Pipeline Company of America together with all costs which may be adjudged against them should said order last mentioned be sustained, then this obligation shall become null and void and of no further force and effect."

The aforesaid bond was approved by an order entered in the above entitled cause on December 3, 1940. Thus it appears from the aforesaid orders entered by this Court and from the condition of said bond that the same was executed and filed with this Court for the benefit of the purchasers at wholesale (including your petitioner) of natural gas from Natural Gas Pipeline Company of America during the period while the order of the Federal Power Commission, dated July 23, 1940, was stayed by order of this Court.

2. On March 16, 1942, the Supreme Court of the United States sustained the said order of the Federal Power Commission dated July 23, 1940. As a result thereof and pursuant to the aforesaid bond, Natural Gas Pipeline Company of America and Texoma Natural Gas Company deposited with the Clerk of this Court the sum of \$6,377,913.52, representing the amount paid, during the stay of said order of the Federal Power Commission, to Natural Gas Pipeline Company of America by purchasers of natural gas at wholesale (including your petitioner) from Natural Gas Pipeline Company of America during this period. This

Court in and by its order entered on September 3, 1942, allocated from the aforesaid sum of \$6,377,913.52 the sum of \$25,708.54 as representing the amount paid by your petitioner to Natural Gas Pipeline Company of America for natural gas purchased by it at wholesale during said period. Your petitioner did in fact purchase natural gas at wholesale during said period from Natural Gas Pipeline Company of America and paid therefor at the rates prevailing while the said order of the Federal Power Commission was stayed by order of this Court, and therefore said sum of \$25,708.54 represents moneys paid by your petitioner to Natural Gas Pipeline Company of America in excess of the rates fixed by the Federal Power Commission in its order dated July 23, 1940, and refunded according to the condition of said bond for the use and benefit of your petitioner.

3. Your petitioner is the only party in interest in said sum of \$25,708.54 who is in privity with Natural Gas Pipeline Company of America under the contracts or scheduled rates which gave rise to such sum and, therefore, your petitioner is the only party entitled to repayment thereof.

4. A refund of said sum of \$25,708.54 to the ultimate consumers of the natural gas purchased by your petitioner from Natural Gas Pipeline Company of America during the aforesaid period or to the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, as the so-called representatives of such consumers would in fact result in a reduction of rates during said period between such consumers or their representatives and the retailer of natural gas to them. [fol. 185] The Natural Gas Act expressly provides that it only "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*" Under this provision the Federal Power Commission is without jurisdiction to determine rates between the ultimate consumers of natural gas and their local distributor. It therefore must follow that this Court is without jurisdiction to determine any question or dispute between your petitioner and the ultimate con-

sumers of the gas purchased by it from Natural Gas Pipeline Company of America which would effect a reduction of the rates paid by such consumers for such gas.

5. The purpose of the Natural Gas Act is to regulate rates between the interstate carrier of natural gas and the wholesale purchaser of such gas, and the Act evidences a clear intention that overpayments resulting from rates found to be excessive by the Federal Power Commission shall be refunded to the party who paid the same. Thus it is provided in Section 717c(e) of the Act that when a new schedule of increased rates or charges is filed by a natural gas company and the same are made effective by an interim order of the Commission, nevertheless "the Commission may, by order, require the natural gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, *specifying by whom and in whose behalf such amounts were paid*, and, [fol. 186] upon completion of the hearing and decision, to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." Clearly this provision contemplates that overpayments on account of excessive rates shall be repaid to the purchaser from the natural gas company. There is no distinction in principle in the situation of your petitioner before this Court and that which is expressly covered by the foregoing provision of the Act, and your petitioner therefore is entitled to repayment of said sum of \$25,708.54.

6. The Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, are without statutory power or authority to represent in these proceedings the ultimate consumers of gas purchased by your petitioner from Natural Gas Pipeline Company of America during the aforesaid period, or to receive payment of said sum of \$25,708.54, or to administer or distribute said sum in any manner whatsoever. Even if it should be finally determined that such ultimate consumers are entitled to said sum and if the administration and disposition thereof is entrusted to the respective Treasurers of said municipalities they, to the extent that ultimate consumers do not make a claim to said sum, will enjoy a windfall without any claim or right thereto whatsoever, and it has been recognized by this Court in these proceedings that by

reason of death, absence in the military service, etc., that a substantial number of the ultimate consumers will not make claims for their respective portions of said sum. Also, to the extent that a portion of said sum of \$25,708.54 represents payments made by your petitioner to Natural Gas Pipeline Company of America for natural gas which escaped from your petitioner's gas mains and was therefore lost, the ultimate consumers or said municipalities will enjoy a windfall at the expense of your petitioner if said sum is [fol. 187] paid to either of them.

7. This Court in its order entered on February 14, 1944, denying the prayer of your petitioner's original petition made the finding as follows:

" * * * this Court having previously ruled that the refund made by Natural Gas Pipeline Company of America and Texoma Natural Gas Company belonged to the consumers of gas supplied by customers of said Natural Gas Pipeline Company of America and Texoma Natural Gas Company, * * *"

The ruling referred to in this finding was based on a disclaimer of interest in such refund filed herein on or about June 2, 1944, by all of the local distributors of gas in the Chicago area and therefore is not a guiding precedent or a decision which affects your petitioner in any way. Furthermore, this Court, by various orders heretofore entered herein, has directed that said sum of \$25,708.54 (therein designated as the "Central States Electric Company Fund") should be segregated and separately dealt with.

8. This Court in its order entered on February 14, 1944, directing that said sum of \$25,708.54 be paid by the Clerk of this Court to the respective Treasurers of the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, in the amounts therein set forth, made the finding as follows:

"And it appearing that a part of said refund belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa; and it appearing that the total amount which belongs to said consumers in said cities of the State of Iowa is \$25,708.54."

This finding is necessarily based on the conclusion that the excessive rates paid by your petitioner to Natural Gas

Pipeline Company of America are reflected in the rates paid by the ultimate consumers to your petitioner. So far as your petitioner is concerned, there is no evidence before this [fol. 188] Court upon which this Court could properly base any such conclusion or finding. On the contrary, your petitioner's original petition for intervention herein alleges facts (which your petitioner had no opportunity to substantiate by evidence before this Court) establishing that the rates paid by the ultimate consumers to your petitioner do not reflect the excessive rates paid by your petitioner to Natural Gas Pipeline Company of America. In this connection, the original petition alleges that the rates paid by the ultimate consumers to your petitioner were insufficient to provide a fair return on your petitioner's investment and that your petitioner voluntarily induced the making of such rates in order to meet competitive conditions and to increase its volume of business. This Court denied the relief sought in said original petition on the ground that the same required a determination of local rates which was a matter beyond its jurisdiction. If this is true, then it would appear that it is also beyond the jurisdiction of this Court to arrive at the conclusion that the rates paid by the ultimate consumers reflect the excessive rates paid by your petitioner to Natural Gas Pipeline Company of America. Consequently it must follow that under the Natural Gas Act this Court is without jurisdiction to award said sum of \$25,708.54 to any party to these proceedings other than your petitioner. Furthermore, since your petitioner did not during the aforesaid period obtain a fair return on its investment due substantially to excessive rates paid by it to Natural Gas Pipeline Company of America, equity would be served by payment of said sum of \$25,708.54 to your petitioner rather than by payment thereof to the ultimate consumers.

Wherefore your petitioner prays for the entry of an order herein granting leave to your petitioner to file herein in [fol. 189] stanter this its Supplemental Petition and directing payment of said sum of \$25,708.54 to your petitioner.

Central States Electric Company, by Perry M. Chadwick, Dayton Ogden, Its Attorneys, 111 West Monroe Street, Chicago, Illinois, Randolph 6130.

[fol. 192] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COM-
MISSION, Respondents

RESISTANCE OF CITY OF MUSCATINE, IOWA, TO MOTION OF
CENTRAL STATES ELECTRIC COMPANY FOR LEAVE TO FILE
SUPPLEMENTAL PETITION, AND FOR STAY OF ORDER ENTERED
FEBRUARY 14, 1944—Filed March 17, 1944

Comes now the respondent, City of Muscatine, Iowa, and resists the motion of Central States Electric Company for leave to file its supplemental petition and for a stay of a certain order entered herein on February 14, 1944, and as grounds for such resistance respectfully states and shows to the Court:

1. On September 3, 1942, this Court entered in this cause its Findings of Fact and Conclusions of Law and Decree, wherein and whereby the Court found that the fund amounting to \$6,377,913.52, less the clerk's statutory fee of one per cent and costs and expenses of distribution, belonged to the eligible ultimate consumers of the several utilities involved, and should be so distributed; and that none of the utilities is entitled to such funds. Included in said sum is the sum of \$25,708.54 allocated to the said Central States Electric Company for distribution to its customers, or the customers of its assignor, Iowa Electric Company, in the cities of Muscatine, Greenfield, Knoxville and Pella, all in the State of Iowa; that the said Central States Electric Company was a party to this proceeding and was fully advised of the provisions of said decree from and after the rendition thereof; that no appeal from said findings and decree has ever been taken by said Central States Electric [fol. 193] Company, and the same is now a verity as to all matters contained therein relating to the said fund, insofar as the said Central States Electric Company is concerned, and said company is bound thereby and cannot now be heard to question or controvert the terms and provisions of said

decree with respect to the distribution of said fund to the ultimate consumers of the gas, for whose benefit these proceedings were instituted.

2. That the Supplemental Petition attached to said motion, and now sought to be filed herein by said Central States Electric Company, is an attempt to reopen these proceedings and to secure a re-adjudication by this Court of matters which were fully and finally determined by it in the decree entered on September 3, 1942; that said petitioner was a party to, and is bound by each and all of the terms and provisions of said decree with respect to the distribution of the fund in question, and said petitioner should not now be heard to question said findings and decree of this Court.

3. That at the date of the entry of said findings of fact and conclusions of law and decree, on September 3, 1942, this Court had full jurisdiction of the parties and subject matter dealt with in said decree, and the said Central States Electric Company, being then a party to this proceeding and within the jurisdiction of the Court in this cause, cannot now be heard to question such jurisdiction or to attack the right of the Court to order distribution of the fund in question to the ultimate consumers of the gas.

4. All of the matters set forth in Paragraphs 1 to 5, inclusive, of the Supplemental Petition attached to said motion, have been fully adjudicated by this Court in this cause, and have been finally determined adversely to the contention of said petitioner, by the decree entered herein on September 3, 1942, which decree is a verity as to said petitioner [fol. 194] and the petitioner is bound thereby, and cannot now be heard to question the authority and jurisdiction of this Court to deal with said fund as provided in said decree and in the order entered by the Court herein on February 14, 1944.

5. This respondent denies that it is without statutory power or authority to represent in these proceedings the ultimate consumers of gas purchased by said petitioner from the Natural Gas Pipeline Company of America during the refund period, and avers that it has full power and authority to deal with said funds in behalf of said consumers, and that such authority is coextensive with its authority to act for and represent such consumers in the determi-

nation of schedules of rates to be paid by them as the customers of the gas utility operating under a franchise granted by said City. This respondent expressly disclaims any title or interest in said fund except so much thereof as may be necessary to pay the cost of making distribution to said consumers and for its actual outlays in appearing for said consumers in said proceeding, and that if any of the ultimate consumers who would be entitled to a refund under the decree of this Court do not make a claim therefor by reason of death, removal or otherwise, this respondent is ready and willing to deliver any sums which would be due to such consumers, to said Central States Electric Company, as assignor of Iowa Electric Company, the actual operating gas utility in the City of Muscatine. This respondent denies, however, that said Central States Electric Company is entitled to any part of the sum to be paid to the Treasurer of the City of Muscatine under the order of this Court entered herein on February 14, 1944, by reason of any claimed leakage from petitioner's gas mains, for the reason that said leakage has been fully discounted in the rates charged to the consumers of gas in the City of Muscatine during the refund period, and the same should not be taken into account in any distribution of said fund.

[fol. 195] 6. This respondent avers that the fund of \$25,708.54 which said petitioner is seeking to have paid to it instead of being distributed to the ultimate consumers arose out of the same circumstances and is of the same character as all other funds included in the sum of \$6,377,913.52 ordered to be distributed under the terms of the decree entered herein on September 3, 1942, and for the reasons herein above stated, said petitioner is now estopped to assert or claim that the same are distinguishable from any other item covered by said decree, as claimed in Paragraph 7 of its supplemental petition.

7. This respondent further states that the allegations contained in Paragraph 8 of said supplemental petition are, in substance, a repetition of the matters urged by said petitioner in its original petition of intervention, all of which have been heretofore controverted and denied by this respondent, and respondent now expressly renews its denial of said allegations without restating them in detail.

This respondent respectfully submits to the Court that none of the matters alleged in said Supplemental Petition attached to petitioner's motion, furnish a proper or adequate ground for the granting of said motion; that all of said matters have been fully and finally adjudicated by this Court by orders and decrees heretofore entered in this proceeding, and which are binding and conclusive upon said petitioner, and this respondent, therefore, prays that said motion be denied as to both grounds thereof.

City of Muscatine, Iowa, by Matthew Westrate, City Attorney, 614-615 Laurel Building, Muscatine, Iowa.

[fol. 196] [File endorsement omitted.]

[fols. 197-198] IN THE UNITED STATES CIRCUIT COURT OF
APPEALS

[Title omitted]

No. 7454

AFFIDAVIT OF SERVICE—Filed March 17, 1944

STATE OF IOWA,

Muscatine County, ss:

I, Matthew Westrate, being first duly sworn on oath state that I am City attorney of the City of Muscatine, Iowa, Respondent to the Petition of Intervention heretofore filed in the above cause by Central States Electric Company, and to the Motion filed by said Petitioner for leave to file Supplemental Petition and for Stay of a certain order entered on February 14, 1944; that on the 16th day of March, 1944, I mailed a copy of the Resistance of the City of Muscatine, Iowa, to said Motion of the Central States Electric Company for leave to file Supplemental Petition and for Stay of Order Entered February 14, 1944, by registered mail to Mr. Dayton Ogden, one of the attorneys of record for Central States Electric Company, in care of Chapman

& Culter, at 111 West Monroe Street, in the City of Chicago, Illinois.

(Signed) Matthew Westrate.

Subscribed and sworn to before me by the said Matthew Westrate this 16th day of March, 1944.

(Signed) Mary Prosser, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 199] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents

RESISTANCE TO SUPPLEMENTAL PETITION OF CENTRAL STATES
ELECTRIC COMPANY--Filed March 20, 1944

Comes now, Elmer E. Johnson, and for himself as a user of the natural gas involved in the above cause of action, and as mayor of the Town of Greenfield, Iowa, and for and on behalf of said Town of Greenfield, and Resists the Supplemental Petition of the above petitioners filed in the above Cause of Action on or about the 13th day of March, 1944. That he answers each item as numbered:

1. and 2. That this respondent or resistant knows not of the bond about which petitioner speaks, and it may have been filed and approved as stated and for the purposes therein stated, but the fact remains that this rebate is not the property of the above petitioner, but is the property of the ultimate users; as to distribution of this rebate, this resistant can conceive that petitioner might be the proper person or agency to distribute this money to the ultimate users, but before permitted to do so, should be put under bonds to so do, and should do so under the orders of the

court and, *and* make reports from time to time as to its progress and a final report as to the final distribution, and that any undistributed portion should be paid then as finally ordered by the Court.

3. As to paragraph three, your resistant specifically denies that petitioner is the only party interested in said funds, for said fund now consists of money that has been wrongfully collected from the consuming public, and if it does not belong to them, then it belongs back at the beginning to the company or concern who first took the gas out of the ground, and apparently they are making no claim for it.

4. That as to the allegations of this paragraph of their petition, your resistant knows not, and therefore he denies that the meaning of the Natural gas act is as interpreted by petitioner.

[fol. 200] 5. Your resistant, denies that the interpretation of petitioner of this part of the Natural Gas Act is the correct one.

6. It would seem that there might be some ground to this contention of petitioners, but it would seem that city treasurers could give a bond to distribute this money, the same as any one else, and do all things as ordered by the Court. Probably the Town could do this as well, as impartially, and at as little expense as any one else, and if there should be any windfall, as petitioner speaks of, it would seem that no one would be more entitled to hold this money in trust for the ultimate user than the town, for claim could always be made for it. If this be done, the town should have some allowance for the expense of distribution. As to windfalls, it would appear that the town would have as much right as the petitioner or more so, for this payment would sure be a windfall to them, and in case of payment to them, the ultimate consumers would never receive any of the payments due them; but if payment were made to the town, to be distributed as ordered by the Court, the great majority of the ultimate users would receive their pay-rebate.

All the above to apply, provided petitioner will not take the money, post bond and make distribution as ordered by the Court.

7. That the sum of \$25,708.54, or the Central States Electric Company fund, may be a fund apart from the other funds previously dealt with by the Court, but if so, there is no reason why same should not be dealt with the same as the others.

8. That your resistant denies the contents of this paragraph, for the reasons heretofore urged in his original resistance, for the reason that this company bought this gas at a price that they thought they could make a profit out of the sale of, and because they did not make as big a profit as they anticipated gives them no more right to this money, than it gives them the right to collect the loss from the original or ultimate users by sending them a separate bill for the part each used and the loss the company suffered from each said ultimate users.

Wherefore, your resistant, Johnson, for himself and for the town of Greenfield, Adair County, Iowa, ask that said petitioners substituted or supplemental petition be dismissed at their costs, and that said \$25,708.54 be distributed to the ultimate users of said gas.

Town of Greenfield, Iowa. By Elmer E. Johnson,
Mayor. Elmer E. Johnson, pro se, Greenfield,
Iowa.

[fol. 201] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION, et al., Respondents

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL PETITION AND
DENYING SAME—March 28, 1944

It is ordered that the motion of Central States Electric Company for leave to file its supplemental petition be, and it is hereby, granted.

It is further ordered that the Supplemental Petition of Central States Electric Company be, and it is hereby, denied.

[fol. 202] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER
COMMISSION, Respondents

PETITION OF CENTRAL STATES ELECTRIC COMPANY, INTERVENOR
HEREIN, FOR AN ORDER STAYING THE EXECUTION AND EN-
FORCEMENT OF THE ORDERS OR DECREES OF THIS COURT
ENTERED ON FEBRUARY 14, 1944, ON THE ORIGINAL PETITION
FOR INTERVENTION OF CENTRAL STATES ELECTRIC COMPANY
AND THE ORDER OF DECREE OF THIS COURT ENTERED ON
MARCH 28, 1944, ON THE SUPPLEMENTAL PETITION OF
CENTRAL STATES ELECTRIC COMPANY FOR THE PURPOSE OF
ENABLING CENTRAL STATES ELECTRIC COMPANY TO APPLY
FOR AND OBTAIN A WRIT OF CERTIORARI FROM THE SUPREME
COURT—Filed March 29, 1944

To the Honorable Evan A. Evans, William M. Sparks and
Otto Kerner, Judges of the Circuit Court of Appeals for
the Seventh Circuit of the United States:

Your petitioner, *Central States Electric Company*, a corporation, respectfully presents this its application for an order staying the execution and enforcement of the orders or decrees of this Court rendered in the above cause on the 14th day of February, 1944, denying the prayer of the original petition for intervention of Central States Electric Company and directing payment by the Clerk of this Court of the sum of \$20,823 to the City Treasurer of the City of Muscatine, Iowa, the sum of \$1,221 to the City Treasurer of the City of Greenfield, Iowa, the sum of \$2,260 to the City Treasurer of the City of Knoxville, Iowa, and the sum of \$1,403 to the City of Pella, Iowa, and staying the execution and enforcement of the order or decree of this Court rendered in the above cause on March 28, 1944, denying the prayer of the supplemental petition of Central [fol. 203] States Electric Company, which application is made pursuant to the provisions of Section 350 of Title 28 of the United States Code to enable your petitioner to apply

for and obtain a writ of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

1. The rates paid to your petitioner by the ultimate consumers of natural gas purchased by them from your petitioner during the so-called refund period were insufficient to provide a fair return on the investment of your petitioner.
2. The condition of the orders of this Court and of the bond under which the sum of \$25,708.54 was paid to the Clerk of this Court by Natural Gas Pipeline Company of America and Texoma Natural Gas Company is to the effect that said sum should be refunded to those who purchased natural gas from Natural Gas Pipeline Company of America and Texoma Natural Gas Company at wholesale, which includes your petitioner.
3. The said sum of \$25,708.54 represents moneys paid by your petitioner to Natural Gas Pipeline Company of America in excess of the rates fixed by the Federal Power Commission in its order dated July 23, 1940, and which were refunded by Natural Gas Pipeline Company of America and Texoma Natural Gas Company according to the condition of said orders and said bond for the use and benefit of your petitioner.
4. Your petitioner is the only party in interest in said sum of \$25,708.54 who is in privity with Natural Gas Pipeline Company of America under the scheduled rates which gave rise to such fund.
5. A refund of said sum of \$25,708.54 to the ultimate consumers of the natural gas purchased by your petitioner from Natural Gas Pipeline Company of America during the refund period, or to the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, as the so-called representatives of such consumers, would in fact result in a reduction of rates during said period between such consumers and your petitioner, and the reduction of such rates is a matter beyond the jurisdiction of this Court.
6. The Natural Gas Act expressly requires refunds made by natural gas companies on account of excessive

rates to be made to the distributors who paid such rates to the natural gas companies.

7. The Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, are without statutory power or authority to represent in these proceedings the ultimate consumers of gas purchased by your petitioner from Natural Gas Pipeline Company of America during the refund period or to receive payment of said sum of \$25,708.54 or to administer or distribute said sum in any manner whatsoever.

8. Your petitioner is not bound by the earlier decisions of this Court directing that refunds be made to the ultimate consumers, for the reason that such decisions were rendered on the basis of a disclaimer of interest by the distributors in the refund so made and for the further reason that your petitioner was not then a party to these proceedings.

9. The decision of this Court directing that said sum of \$25,708.54 be paid to the respective municipal representatives of the ultimate consumers of the gas involved is based on the conclusion that the excessive rates paid by your petitioner to Natural Gas Pipeline Company of America during the refund period are reflected in the rates paid by the ultimate consumers to your petitioner. There is no evidence before this Court upon which it could properly base any such conclusion.

10. Since your petitioner did not receive a fair return on its investment during the refund period, as evidenced by its original petition for intervention herein, it is equitably entitled to said sum of \$25,708.54.

11. This Court erred in failing to enter an order or decree herein directing that said sum of \$25,708.54 be paid to your petitioner.

The reason why a stay is deemed necessary is that payment of said sum of \$25,708.54 to the City Treasurers of the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, as provided in the order of this Court entered on February 14, 1944, would defeat the purposes of a writ of certiorari to the Supreme Court, and if such writ were granted and

the decision of this Court reversed by the Supreme Court would render such reversal meaningless so far as your petitioner is concerned.

Dated March 29, 1944.

Perry M. Chadwick, Dayton Ogden, Attorneys for
Central States Electric Company, Petitioner.

[fol. 205] I hereby certify that it is the bona fide intention of Central States Electric Company to make application to the Supreme Court of the United States for a writ of certiorari within the time limit prescribed by the Statutes in such case made and provided, and that I believe there is merit in its case and that the aforesaid orders or decrees of the Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

Dayton Ogden.

[fol. 206] [File endorsement omitted.]

[fol. 207] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents

AFFIDAVIT OF SERVICE—Filed March 29, 1944

ROSCOE C. NASH, being first duly sworn, on oath deposes and says that he served a copy of the Petition of Central States Electric Company for an Order staying the execution and enforcement of the Orders or decrees of this Court entered in the above cause on February 14, 1944, and March 28, 1944, respectively, for the purpose of enabling Central States Electric Company to apply for a Petition and Writ of Certiorari from the Supreme Court of the United States on the persons named as follows:

Mr. George Staff
Federal Power Commission
Washington, D. C.

Mr. Albert E. Hallett
Illinois Commerce Commission
208 South La Salle Street
Chicago, Illinois

Poppenhusen, Johnston, Thompson & Raymond
11 South La Salle Street
Chicago, Illinois

Daily, Dines, White and Fiedler
122 South Michigan Avenue
Chicago, Illinois

Sidley, McPherson, Austin & Burgess
11 South La Salle Street
Chicago, Illinois

[fol. 208] Isham, Lincoln & Beale
72 W. Adams Street
Chicago, Illinois

Alschuler, Putman, Johnson & Ruddy
32 Water Street
Aurora, Illinois

Mathew Westrate, Attorney at Law
Muscatine, Iowa

City Treasurer
Muscatine, Iowa

City Treasurer
Greenfield, Iowa

City Treasurer
Knoxville, Iowa

City Treasurer
Pella, Iowa

by enclosing the same in properly stamped envelopes addressed to the persons named above at their respective addresses, which envelopes were deposited in the United States mail box at 111 West Monroe Street, Chicago, Illinois, before the hour of five o'clock P. M. on March 29, 1944.

(S.) Roscoe C. Nash.

Subscribed and sworn to before me this 29th day of March, 1944. (S.) Edward F. Brubaker, Notary Public. My commission expires October 11, 1947. (Seal.)

[File endorsement omitted.]

[fol. 209] IN UNITED STATES CIRCUIT COURT OF APPEALS

7454

NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION, et al., Respondents

STAY ORDER—March 31, 1944

On motion of counsel for Central States Electric Company, it is ordered that the enforcement of the orders of this Court herein of February 14, 1944 and March 28, 1944 be stayed for a period of thirty days from this date.

[fol. 210] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA and TEXOMA
NATURAL GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION and ILLINOIS POWER COMMISSION, Respondents

DESIGNATION OF RECORD FOR CERTIORARI—Filed April 11, 1944

To the Clerk of the Aforesaid Court:

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

Item No.	Date of Filing of Document or Entry of Order Described	Description of Document or Order
1	7/23/40	Order of Federal Power Commission entered 7/23/40, Docket No. G-109 and G-112, as amended by order of said Commission entered on 8/8/40.
2	9/14/40	Petition of Natural Gas Pipeline Company of America and Texoma Natural Gas Company for review of interim rate order of Federal Power Commission entered 7/23/40.
3	9/14/40	Appearance of Illinois Commerce Commission.
4	9/18/40	Appearance of Federal Power Commission.

Item No.	Date of Filing of Document or Entry of Order Described	Description of Document or Order
5	11/1/40	Order staying order of Federal Power Commission.
6	11/26/40	Order denying motion to reinstate bond filed in Cause No. 7439 and directing petitioners to file bond without surety in penal sum of \$1,000,000.
[fol. 211]		
7	12/3/40	Bond filed pursuant to stay order of 11/26/40.
8	12/3/40	Order approving bond filed pursuant to stay order of 11/26/40.
9	8/30/40	Bond filed in Cause No. 7439.
10	8/30/40	Order entered in Cause No. 7439 staying order of Federal Power Commission.
11	11/1/40	Order entered in Cause No. 7439 staying order of Federal Power Commission.
12	11/26/40	Order entered in Cause No. 7439 denying motion to reinstate bond in Cause No. 7439 and directing petitioners to file bond without surety in penal sum of \$1,000,000.
13	5/22/42	Opinion by Lindley J.
14	5/22/42	Order that counsel present form of judgment for approval.
15	6/13/42	Statement of United Gas Service Company re its interest in refund.
16	6/18/42	Statement of Natural Gas Pipeline Company of America re its interest in refund.
17	6/18/42	Statement of Texoma Natural Gas Company re its interest in refund.
18	6/18/42	Statement of Federal Power Commission re its interest in refund.
19	6/18/42	Statement of The Peoples Gas Light and Coke Company re its interest in refund.
20	6/18/42	Statement of Illinois Commerce Commission re its interest in refund.
21	6/24/42	Order retaining jurisdiction of refund.
22	6/24/42	Order appointing Tappan Gregory as agent to supervise refunds.
23	6/26/42	Order re interest and costs.
24	6/26/42	Memorandum opinion on interest and costs.
[fol. 212]		
25	6/30/42	Statement of Central States Electric Company re its interest in refund.
26	6/30/42	Memorandum opinion re methods of making refunds.
27	7/1/42	Order designating banks and amounts to be deposited in re refund.
28	7/2/42	Statement of Iowa-Illinois Electric Company re its interest in refund.
29	7/3/42	Statement of Iowa-Nebraska Light and Power Company re its interest in refund.
30	9/3/42	Decree re distribution of refunds.
31	9/22/42	Order re extension of time to show cause.
32	11/19/42	Order modifying paragraph 4 on page 7 of the decree entered 9/3/42.
33	11/24/42	Order separating interest of Central States Electric Company in the refund for separate disposal.
34	12/15/42	Supplemental decree.
35	1/22/43	Order of distribution.
36	6/7/43	Stipulation of City of Nebraska, et al. re settlement of their claims in the refund.
37	6/7/43	Order entered pursuant to preceding stipulation.
38	9/1/43	Motion of Central States Electric Company to intervene.
39	9/1/43	Petition of Central States Electric Company to intervene.
40	9/1/43	Order granting leave to Central States Electric Company to file its petition and to intervene.

Item No.	Date of Filing of Document or Entry of Order Described	Description of Document or Order
41	11/6/43	Order to give notice re application to intervene by Central States Electric Company.
42	12/1/43	Resistance of City of Muscatine to intervention of Central States Electric Company.
43	12/1/43	Affidavit of service.
44	12/1/43	Resistance of City of Greenfield to intervention of Central States Electric Company.
[fol. 213]		
45	12/7/43	Affidavit of service.
46	12/7/43	Affidavit of Journal Printing Company.
47	12/7/43	Affidavit of Adair County Press.
48	2/3/44	Hearing on intervention of Central States Electric Company taken under advisement.
49	2/14/44	Amendment to resistance of City of Muscatine to intervention of Central States Electric Company.
50	2/14/44	Affidavit of service.
51	2/14/44	Order denying Central States Electric Company's petition for intervention.
52	2/14/44	Order directing payment of Central States Electric Company fund to City Treasurers.
53	2/18/44	Letter from Chapman and Cutler to Clerk declining to consent to payment of Central States Electric Company Fund to City Treasurers.
54	3/11/44	Motion of Central States Electric Company for leave to file supplemental petition.
55	3/11/44	Supplemental petition of Central States Electric Company.
56	3/11/44	Affidavit of service.
57	3/17/44	Resistance of City of Muscatine to motion of Central States Electric Company to file supplemental petition.
58	3/17/44	Affidavit of service.
59	3/20/44	Resistance of Elmer Johnson pro se and as Mayor of the City of Greenfield to supplemental petition of Central States Electric Company.
60	3/23/44	Order granting leave to Central States Electric Company to file its supplemental petition and denial thereof.
61	3/29/44	Petition of Central States Electric Company to stay execution of orders of February 14, 1944, and March 28, 1944.
[fol. 214]		
62	3/29/44	Affidavit of service.
63	3/31/44	Order staying execution of orders of February 14 and March 28, 1944, for 30 days.
64		This designation.
65		Affidavit of service of this designation.
66		Clerk's certificate.

Perry M. Chadwick, Dayton Ogden, Attorneys for
Central States Electric Company.

[fol. 215] [File endorsement omitted]

[fol. 216] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
No. 7454

AFFIDAVIT OF SERVICE—Filed April 11, 1944

ROSCOE C. NASH, Being first duly sworn, on oath deposes and says that he served a copy of the designation of the

record on application of Central States Electric Company to the Supreme Court of the United States for certiorari on the persons named as follows:

Mr. George Staff, Federal Power Commission, Washington, D. C.;

Mr. Albert E. Hallett, Illinois Commerce Commission, 208 South La Salle Street, Chicago, Illinois;

Poppenhusen, Johnston, Thompson & Raymond, 11 South La Salle Street, Chicago, Illinois;

Daily, Kines White and Fiedler, 122 South Michigan Avenue, Chicago, Illinois;

Sidley, McPherson, Austin & Burgess, 11 South La Salle Street, Chicago, Illinois;

Isham, Lincoln & Beale, 72 West Adams Street, Chicago, Illinois;

Alschuler, Putnam, Johnson & Ruddy, 32 Water Street, Aurora, Illinois;

Mathew Westrate, Atty. at Law, Muscatine, Iowa;

[fol. 217] City Treasurer, Muscatine, Iowa;

City Treasurer, Greenfield, Iowa;

City Treasurer, Knoxville, Iowa;

City Treasurer, Pella, Iowa;

by enclosing the same in properly stamped envelopes addressed to the persons named above at their respective addresses, which envelopes were deposited in the United States mail box at 111 West Monroe Street, Chicago, Illinois, before the hour of three o'clock P. M. on April 11, 1944.

(Signed) Roscoe C. Nash.

Subscribed and sworn to before me this 11th day of April, 1944. (Signed) Edward F. Brubaker, Notary Public. My commission expires October 11, 1947. (Seal.)

[File endorsement omitted.]

[fol. 218] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 219] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 12, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3329)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. ~~1008~~ 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.

BERT L. KLOOSTER,
Attorney for Petitioner.

PERRY M. CHADWICK,
ROSCOE C. NASH,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No.

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,
vs.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petition of CENTRAL STATES ELECTRIC COMPANY
(hereinafter called "Central") respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Central during the period here involved was a corporation engaged in the utility business in the State of Iowa

and elsewhere (R. 106). During this period it purchased natural gas from Natural Gas Pipeline Company of America under contract with such Company and resold the same in the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa (R. 107, 108). Natural Gas Pipeline Company of America was a natural gas company subject to the provisions of the Natural Gas Act and resold at wholesale the natural gas transported by it to local distributors, such as Central, in Illinois, Iowa and elsewhere (R. 9, 10).

The issues presented hereby arise on the original and supplemental petition of Central for intervention (R. 106, 134) in proceedings ancillary to proceedings initiated by Natural Gas Pipeline Company of America and Texoma Natural Gas Company (hereinafter sometimes called the "Natural Gas Companies") in the Court of Appeals under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) (R. 8). The original proceedings (identified below as Cause No. 7454) were filed to review an interim rate order entered on July 23, 1940, as amended by an order entered August 8, 1940, by the Federal Power Commission, which directed the Natural Gas Companies to reduce their rates on natural gas so as to reflect an annual reduction in their operating revenues of not less than \$3,750,000.00 and to make this reduction effective as to all bills regularly rendered on and after September 1, 1940 (R. 1, 6, 7). The validity of this order was sustained by this Court in *Federal Power Commission v. Natural Gas Pipeline Company of America*, 315 U.S. 575, and this Court therein reversed the judgment of the Court of Appeals vacating said order.

Prior to the commencement of the original proceedings the Natural Gas Companies filed a petition in the Court of Appeals, identified as Cause No. 7439, to obtain a temporary stay of the interim rate order pending the Natural Gas Companies' application for rehearing thereon before the Federal Power Commission (R. 32, 33, 34). Such a

stay order was entered on August 30, 1940, in Cause No. 7439, which stay order provided, among other things, the following:

"That this order will become effective upon the execution and delivery to the Clerk of this court by petitioners of their joint and several bond in the penal sum of \$1,000,000, conditioned on their refunding to those who purchased natural gas from petitioners at wholesale, as their several interests appear, the amount represented by the reduction in revenues as directed by the Federal Power Commission in its order dated July 23, 1940, if the order last mentioned be sustained" (R. 34).

The foregoing temporary stay order was dissolved on November 1, 1940 (R. 35).

Also on November 1, 1940, a stay order was entered in Cause No. 7454 staying the interim rate order until the further order of the court (R. 28, 29). On November 26, 1940, an order was entered in Cause No. 7454 and in Cause No. 7439, which provided that as a condition to said stay order the Natural Gas Companies should forthwith file their bond without surety in the penal sum of \$1,000,000.00, conditioned in all respects the same as the bond filed in Cause No. 7439 by the Natural Gas Companies (R. 29, 36).

On December 3, 1940, in conformity with the order of November 26, 1940, the Natural Gas Companies filed their bond in Cause No. 7454 conditioned as follows:

"The condition of this obligation is such that if the undersigned shall pay or cause to be paid to the purchasers at wholesale of natural gas from Natural Gas Pipeline Company of America as their several interests appear the amounts representing the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review of the order of the Federal Power Commission dated July 23, 1940, directing the undersigned, Natural Gas Pipeline Company of America, to file new schedules of rates and charges to reflect

a reduction of not less than \$3,750,000 per annum in the operating revenues of said Natural Gas Pipeline Company of America together with all costs which may be adjudged against them should said order last mentioned be sustained, then this obligation shall become null and void and of no further force and effect" (R. 29, 30).

The aforesaid bond was approved by order entered on December 3, 1940 (R. 31).

On March 16, 1942, this Court rendered its decision sustaining the interim rate order of the Federal Power Commission (315 U.S. 575) and the Natural Gas Companies thereupon became liable to refund, in accordance with their aforesaid bond, the amount paid to them in excess of the rates permitted by the order during the period of the stay thereof.

On May 22, 1942, which was prior to payment of the amount due on the bond, the Court of Appeals filed an opinion deciding that it was its mandatory duty to take exclusive jurisdiction and control over the refund (when made) and to determine the rights of all claimants thereto (R. 36, 45). An order was entered on June 24, 1942, pursuant to this opinion by which the court took jurisdiction of the refund and enjoined all claimants thereto from proceeding in any other court (R. 51, 52). It appears from the opinion that the Natural Gas Companies had by petition sought the relief granted by the order on the ground that suits had been filed against them in other courts by some of the ultimate consumers of gas sold to such consumers by the local distributors thereof and that unless the Court of Appeals retained jurisdiction of the refund they would be subjected to numerous similar suits (R. 37, 38). The Illinois Commerce Commission filed an answer in response to the petition of the Natural Gas Companies in which it was alleged that the rates charged by the local distributors in Illinois were fixed by the Com-

mission and necessarily reflect the prices paid by the local distributors to the Natural Gas Companies and that the refund representing the excessive rates paid by the local distributors was collected from the ultimate consumers and was equitably due them (R. 38). The local distributors then before the court (which did not include Central) agreed that the refund should equitably be paid to the ultimate consumers who purchased gas from them (R. 38). Since Central was not a party to this agreement, it could only affect the relations between the local distributors who were parties thereto and the ultimate consumers who purchased gas from them.

On June 29, 1942, Central wrote a letter to the Clerk of the Court of Appeals, in response to a letter from him, in which letter Central asserted that the portion of the refund representing excessive rates paid by it during the refund period should be repaid to it and not paid to the ultimate consumers (R. 56, 59).

On June 30, 1942, the Court of Appeals rendered a memorandum opinion in which it purported to weigh and consider the relative rights and interests in general of all local distributors and ultimate consumers in the refund (R. 60). As a result of this consideration the court found that since the rates charged by the local distributors to the ultimate consumers included the excess charges paid by the local distributors to the Natural Gas Companies, the ultimate consumers were, in equity, entitled to receive this excess which was to be refunded by the Natural Gas Companies (R. 62, 63). In other words, the court found that the local distributors in general, as stated in its opinion, were "merely conduits, by which natural gas transported by" the Natural Gas Companies "was delivered to customers by utilities" (R. 62).

In making the aforesaid finding, which apparently was based on the allegations contained in the above mentioned

answer of the Illinois Commerce Commission and disclaimers of interest in the refund filed by most of the local distributors involved (R. 47, 48, 49, 50) (but not by Central), the Court of Appeals assumed jurisdiction to review the contractual relations between the local distributors and the ultimate consumers and to adjudge their respective equities in and to the refund presumably on the conclusion, not supported by evidence, that the rates charged to the ultimate consumers during the refund period in all events included the excessive rates paid by the local distributors during that period to the Natural Gas Companies. In effect the Court of Appeals by determining what the contractual relations between the local distributors and the ultimate consumers were or should have been during the refund period and by finding that the refund equitably belonged to the ultimate consumers assumed jurisdiction to and did retroactively reduce the local rates of the local distributors during the refund period. This determination was made and declared by the court to be generally binding on all local distributors even though Central was not then a party to the cause and had never by any means agreed to a reduction of the rates which it charged its customers.

On July 1, 1942, the Natural Gas Companies, in accordance with their aforesaid bond, deposited with the Clerk of the Court of Appeals the sum of \$6,377,913.52 (R. 64, 65). This sum, exclusive of interest included therein, represented that part of the rates in excess of the rates permitted by the rate order paid to the Natural Gas Companies by the local distributors (including Central) for natural gas purchased by them from the Natural Gas Companies during the refund period (R. 29, 30, 36, 37).

Thereafter, in conformity with the aforesaid opinions of May 22, 1942, and June 30, 1942, the Court of Appeals entered a show cause order (reported in 131 Fed. 2d 137) which, among other things, (a) fixed the refund period as

the period from August 1, 1940, to March 31, 1942, inclusive, (b) determined that the fund of \$6,377,913.52, less all fees, costs and expenses of distribution thereof, was the property of the ultimate consumers of the natural gas purchased by the local distributors from the Natural Gas Companies and was not the property of such local distributors, (c) allocated said fund to certain but not all of the ultimate consumers or customers of the various local distributors, including Central's ultimate consumers, who were allocated the sum of \$25,708.54, (d) found that industrial and home heating users of gas should not participate in the refund, (e) reserved jurisdiction of said fund for the purpose of protecting all persons having rights therein, and (f) directed all claimants to said fund to show cause why the order should not be binding on them (R. 67-80).

Notwithstanding the above opinions and orders, the Court of Appeals expressly recognized that the same were not binding on Central by entering an order on November 24, 1942, in which it found that Central had raised an issue as to whether it or its consumers were entitled to the refund (amounting to \$25,708.54) and directed that such amount should be segregated from the remainder of the fund and dealt with separately (R. 81, 82). This order undoubtedly was entered as a consequence of Central's above mentioned letter to the Clerk of the Court of Appeals under date of June 25, 1942, since Central did not become a party to the proceedings until more than a year after the entry of this order.

On September 1, 1943, Central for the first time became a party to the proceedings by filing its original petition (R. 106) with the Court of Appeals and it was then granted leave to intervene (R. 115). In and by its petition Central requested that the refund of \$25,708.54 be paid to it and not to the ultimate consumers for the reason that the rates in force during the refund period between Central and its customers were such as not to include therein any part

of the excess rates paid by Central to the Natural Gas Companies during that period, it being shown in the petition that Central purposely fixed its rates at less than a fair return on its investment in order to increase the volume of its business (R. 106, 107, 110).

On November 6, 1943, an order was entered on Central's petition which again recognized that the fund of \$25,708.54 had theretofore been segregated by the court from the total fund and ordered to be dealt with separately (R. 115). This order directed that the purchasers of natural gas from Central and their respective representatives be notified of Central's claim to the fund and that they show cause why the relief sought by Central should not be granted (R. 115, 116). Pursuant to this order only the City of Muscatine and the Mayor of the City of Greenfield, purporting to represent the ultimate consumers in those cities, filed pleadings in response to the petition of Central in which they asserted that the fund belonged to the ultimate consumers (R. 116, 122, 126).

On February 14, 1944, the Court of Appeals, without hearing any evidence in support of Central's petition, entered an order denying the same "without prejudice" to Central's "making claim of adjustment with the Cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa, or with the consumers of gas furnished by it in said cities" (R. 129). The bases of this order, as recited by the court therein, were that it was without jurisdiction to hear Central's claim since it involved a determination of "the reasonableness of petitioner's rates" and that the court had previously ruled that the refund made by the Natural Gas Companies belonged to the ultimate consumers (R. 129). In a separate order entered on the same day the court directed that the sum of \$25,708.54 be paid to the Treasurers of the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, in various amounts (R. 130,

131). As grounds for this order the court stated therein that the fund of \$25,708.54 belonged to the ultimate consumers of gas residing in the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, and that the court desired to pay said fund at the earliest possible date "to such parties as are entitled to the same and to permit of a determination of said rights by a court or body having jurisdiction thereof" (R. 130).

In and by the aforesaid orders of February 14, 1944, the Court of Appeals while disclaiming jurisdiction, nevertheless assumed jurisdiction to award said sum of \$25,708.54 to the ultimate consumers and thereby retroactively reduced their rates during the refund period. This apparently was done on the basis announced by the court in its opinion of June 30, 1942, to the effect that the excessive rates paid by the local distributors (including Central) to the Natural Gas Companies during the refund period were included in the rates paid by the ultimate consumers during that period. Also this decision was made notwithstanding Central's claim that in its particular case the excessive rates paid by it to the Natural Gas Pipeline Company of America during the refund period were not included in the rates paid by the ultimate consumers during that period (R. 107, 109, 110, 111).

On March 11, 1944, Central filed its supplemental petition supplementary to its original petition setting forth additional grounds for the payment to it of said sum of \$25,708.54 (R. 133, 134). The City of Muscatine and the Mayor of the City of Greenfield filed responses to the supplemental petition again claiming that said sum belonged to the ultimate consumers (R. 140, 144). Central was granted leave to file its supplemental petition and the same was denied on March 28, 1944, without any hearing or argument on the issues raised thereby (R. 146).

Central's supplemental petition shows as grounds for payment to it of said sum of \$25,708.54 that:

1. Central was legally entitled to payment of said sum because (a) said sum represented excessive rates paid by Central to Natural Gas Pipeline Company of America, which except for the stay order entered by the Court of Appeals would have been retained by Central; (b) the rate order of the Federal Power Commission reduced the rates prevailing between Central and Natural Gas Pipeline Company of America, and Central as the only party in privity with said Company was entitled to benefit of the rate reduction; and (c) the aforesaid bond filed by the Natural Gas Companies to procure the stay order was conditioned on repayment of the excessive rates to the purchasers at wholesale (namely, the local distributors, including Central) (R. 134-139).

2. The Court of Appeals was without jurisdiction to award said sum to Central's ultimate consumers because (a) awarding said sum to them was tantamount to a retroactive reduction of the rates between Central and its ultimate consumers during the refund period, and the court decided by its orders of February 14, 1944, that it was without jurisdiction to determine the reasonableness of local rates; (b) the Natural Gas Act by its express terms does not apply to the local distribution of natural gas or to the facilities used for such distribution; and (c) the jurisdiction and powers of the Court of Appeals in these proceedings are not only derived from but are limited by the terms of the Natural Gas Act, which denies any jurisdiction over the transportation or sale of natural gas between a local distributor and its ultimate consumers (R. 134-139).

3. It was inequitable for the Court of Appeals to award said sum to Central's ultimate consumers be-

cause (a) the court's finding that such consumers were equitably entitled to said sum was based on a conclusion of fact (unsupported by any evidence whatsoever) that the burden of the excessive rates paid by Central to Natural Gas Pipeline Company of America during the refund period had been passed on by it to such consumers who had paid the same; and (b) the court disclaimed jurisdiction (on the theory that it was beyond its power to determine the reasonableness of local rates) to hear any evidence in support of Central's claim that it was equitably entitled to said sum because it and not the ultimate consumers had borne the burden of such excessive rates, yet the court at the same time inconsistently assumed jurisdiction to determine that the ultimate consumers had borne the burden of such excessive rates (R. 134-139).

The Cities of Muscatine and Greenfield do not allege in their pleadings that the ultimate consumers paid rates to Central during the refund period in excess of those fixed by their respective ordinances (R. 116, 122, 126, 140, 144). The pleadings of the City of Muscatine admit the allegations of Central's original petition that the rates fixed by its ordinances remained at the same level during the period beginning on August 6, 1936, and ending on February 4, 1943 (R. 117, 113).

The ultimate consumers in the Cities of Knoxville and Pella, Iowa, made no claim in these proceedings to any part of said sum of \$25,708.54 and no pleadings were filed herein by or on their behalf.

Under the Iowa statutes the power to fix local rates on the sale of gas, electricity, etc., by a private public utility is vested in the municipalities and not in a state commission (App. 28, 29).

II.**JURISDICTION.**

The order of the Court of Appeals denying Central's original petition was entered on February 14, 1944 (R. 129), and on that date a second order was entered directing that said sum of \$25,708.54 be paid as set forth in that order to the four cities involved (R. 130, 131). Central filed its supplemental petition for a supplement to its original petition on March 11, 1944 (R. 133), and the same was denied by order entered on March 28, 1944 (R. 144). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. 347a).

III.**QUESTIONS PRESENTED.**

1. Whether under the Natural Gas Act a purchaser at wholesale of natural gas from a natural gas company is entitled, as a matter of legal right, to a return of rates paid therefor by the purchaser to such company in excess of the rates fixed by a valid order of the Federal Power Commission during the period of a stay of such order by a federal court?

2. Whether under the Natural Gas Act a federal court can deprive a wholesale purchaser of natural gas from a natural gas company of the benefit of a valid rate reduction order of the Federal Power Commission by staying such order and after determination that such stay is erroneous then direct that the fund representing the excessive rates paid by the wholesale purchaser to the natural gas company as a result of the stay be turned over to the ulfi-

mate consumers of such gas and not returned to the wholesale purchaser?

3. Where funds are paid into the registry of a federal court pursuant to a bond deposited to obtain a stay of a rate order of the Federal Power Commission, which bond is conditioned for repayment to the purchaser at wholesale of natural gas from a natural gas company in the event the stay on review appears to be erroneous, and such event occurs, may a federal court nevertheless direct the payment of such funds to the ultimate consumers of such gas rather than to the purchaser at wholesale?

4. Whether under the Natural Gas Act a federal court denying its own jurisdiction may nevertheless in effect exercise jurisdiction to inquire into and regulate the contractual relationship between a local distributor of natural gas and the ultimate consumers of such gas?

5. Whether under the Natural Gas Act a federal court has jurisdiction to retroactively reduce rates between a wholesale purchaser of natural gas from a natural gas company and the ultimate consumers of such gas by awarding to such consumers a fund deposited in the registry of the court as the result of an erroneous stay of a valid order of the Federal Power Commission reducing rates between the natural gas company and the wholesale purchaser?

6. Whether under the Natural Gas Act a federal court which has erroneously stayed a valid rate reduction order of the Federal Power Commission and thereby caused a fund to be deposited in its registry may thereafter when its stay has been found erroneous determine, without a hearing or the presentation of evidence of any kind and while disclaiming any jurisdiction in the matter, that the fund represents excessive rates paid by the ultimate consumers of the natural gas involved and that they rather

than the wholesale purchaser of such gas are equitably entitled to said fund?

7. Whether under the Natural Gas Act a federal court which by exercise of its equitable powers has caused a fund to be deposited in its registry may thereafter refuse to finally determine the rights of adverse claimants to the fund and turn the same over to one of the rival claimants and compel the other rival claimant to resort to some other tribunal to have its asserted rights adjudicated?

8. Whether a federal court may order the payment of a fund, which belongs either to a wholesale purchaser of natural gas or to the ultimate consumers thereof and is on deposit in its registry, to an Iowa municipal corporation which under the laws of that state is without authority to receive, administer or distribute such fund?

9. Whether a federal court may direct the payment of a fund on deposit in its registry to parties not subject to its jurisdiction and who have failed to claim such fund in response to a show cause order entered by the court?

IV.

REASONS FOR ALLOWANCE OF THE WRIT.

The Court of Appeals, by awarding the fund here in dispute not to the party whose payments gave rise to such fund but to the purported municipal representatives of the ultimate consumers of the natural gas involved, has laid down important substantive and procedural rules under the Natural Gas Act. The importance of these rules goes far beyond this particular case since it is inevitable that substantial sums of money will be deposited with federal courts as a result of their orders staying rate reductions effected by the Federal Power Commission acting

under the Natural Gas Act. These rules have not been but should be settled by this Court.

The denial of Central's claim to the fund was made notwithstanding that: (a) Central was entitled to the benefit of the rate reduction order of the Federal Power Commission inasmuch as it was the only party in privity of contract with the Natural Gas Pipeline Company of America which was directed by the order to reduce its rates; (b) if the Court of Appeals had not entered its order staying the rate reduction order of the Commission, Central would have immediately enjoyed the benefit of the reduced rates effected by the order; and (c) the bond filed by the Natural Gas Companies was conditioned for the benefit of the purchasers at wholesale (which included Central) of natural gas from Natural Gas Pipeline Company of America and not for the benefit of the ultimate consumers who were awarded the fund (R. 29, 30). In view of the foregoing, the decision of the court below is probably in conflict with the decisions of this Court in *Adams v. Mills*, 286 U.S. 397, and *In the Matter of Lincoln Gas & Electric Light Company*, 256 U.S. 512.

The jurisdiction and powers of the Court of Appeals are not only derived from but are limited by the terms of the Natural Gas Act. Section 1(b) of this Act (15 U.S.C. 717(b)) declares that the Act shall apply to the transportation and sale of natural gas in interstate commerce, but that it " . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution" In view of this provision it seems apparent that the court below in awarding the fund to Central's ultimate consumers and by so reducing the rates between Central and such consumers during the refund period was exercising jurisdiction beyond and in violation of the express terms

of the Natural Gas Act.' Thus the court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals by its decision on Central's petition has concluded as a matter of law that the burden of excessive rates paid by a wholesale purchaser of natural gas from a natural gas company is borne by the ultimate consumers of such gas. It is of little comfort to Central that the court stated that this conclusion and the award made as a consequence thereof were without prejudice to Central, since the orders of February 14, 1944, require the fund to be paid to Central's rival claimants and not to an independent stakeholder. In and by these orders the court declined jurisdiction to hear Central's petition on its merits and shifted the responsibility for such a hearing to another tribunal, and this probably conflicts with the decision of this Court in *United States v. Morgan*, 307 U. S. 183.

The decision of the Court of Appeals involves the anomalous result that where a reduction in rates is ordered by the Federal Power Commission and such rates are stayed by a federal court, then the ultimate consumers are entitled to the benefit of the rate reduction, but if such reduction is not stayed by a federal court then the benefit thereof flows to the party in privity of contract with the natural gas company which has been so directed to reduce its rates. Clearly the questions presented are of general importance and relate to the construction and application of the Natural Gas Act and the same have not been but should be settled by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

BERT L. KLOOSTER
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PERRY M. CHADWICK,
ROSCOE C. NASH,
Of Counsel.

BRIEF OF CENTRAL IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals of May 22, 1942, appears at pages 36 to 46 of the record and is reported in 128 F. (2d) 481; its opinion of June 26, 1942, is at pages 55 and 56 and is reported in 129 F. (2d) 515; and its opinion of June 30, 1942, is at pages 60 to 63 and is not officially reported.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked are stated under division II at page 12 of the foregoing petition.

STATEMENT OF THE CASE.

A statement of the case is set forth under division I at pages 1 to 11 of the preceding petition, and the same is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

Errors intended to be urged are those specified in the petition under division III at pages 12 to 14 entitled "Questions Presented," the Court of Appeals having ruled adversely to Central, or failed to rule, upon the questions there stated.

SUMMARY OF ARGUMENT.

A. The fund here in dispute belongs to Central as a matter of legal right.

B. Under the Natural Gas Act the Court of Appeals is without jurisdiction to inquire into or regulate the contractual relationship between a local distributor of natural gas and the ultimate consumers of such gas.

C. It was the mandatory duty of the Court of Appeals to retain jurisdiction of and determine who was equitably entitled to the fund here in dispute.

ARGUMENT.

A. The fund here in dispute belongs to Central as a matter of legal right.

This Court has held in *Southern Pacific Company v. Darnell-Taehzer Lumber Company*, 245 U. S. 531, and *Adams v. Mills*, 286 U. S. 397, that the right to recover excessive freight rates from a public carrier is vested in the party who paid such rates, irrespective of the fact that he may have passed on the burden thereof to someone else. In the last mentioned case this Court said:

"If the defendants exacted from them (the parties who paid the rates) an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer."

The decision of the Court of Appeals awarding the fund here in question not to Central, who paid the excessive rates involved, but to Central's ultimate consumers is probably in conflict with the foregoing decisions of this Court.

It is a general principle announced by this Court in *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Company*, 249 U. S. 134, and *In the Matter of Lincoln Gas & Electric Company*, 256 U. S. 512, that a party against whom an erroneous decree has been carried into effect is entitled, in the event of reversal, to that which he has lost thereby and that a bond posted for his benefit in the event the decree is reversed will be enforced according to its terms. In the instant case Central was required to pay excessive rates for natural gas as a result of the erroneous stay by the Court of Appeals of the rate order of the Federal Power Commission and the Natural Gas Companies filed a bond conditioned for the benefit of Central and the other local distributors involved to protect them against error in the entry of the stay order (R. 29, 30). Nevertheless, the Court of Appeals, after the stay was determined by the decision of this Court to be erroneous, disregarded the terms of the bond and awarded the fund to Central's ultimate consumers. This action by the Court of Appeals was probably in conflict with the last mentioned decisions of this Court, and thereby the court below so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

While Section 1(b) of the Natural Gas Act (15 U.S.C. 717(b)) declares that the business of transporting and selling natural gas in interstate commerce for ultimate distribution to the public is affected with a public interest, nevertheless the Act does not contain any provisions indicating that rates charged by natural gas companies in excess of rates fixed by the Federal Power Commission shall be refunded to the ultimate consumers. On the contrary, Section 4(e) of the Act (15 U.S.C. 717c(e)) provides that:

... • • • Where increased rates or charges are thus made effective, the Commission may, by order, re-

quire the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, *specifying by whom and in whose behalf such amounts were paid*, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. * * * (Italics supplied.)

The apparent purpose of the above requirement that the Commission keep accounts specifying by whom and in whose behalf such amounts were paid is to provide a record so that refunds may be made to the persons who paid the excessive rates represented thereby. The Court of Appeals by denying Central's claim to the fund here involved and awarding the same to Central's ultimate consumers has failed to give any effect to the foregoing provision of the Natural Gas Act and has thereby decided an important question of federal law which has not been (so far as Central is informed) but should be settled by this Court.

B. Under the Natural Gas Act the Court of Appeals is without jurisdiction to inquire into or regulate the contractual relationship between a local distributor of natural gas and the ultimate consumers of such gas.

The Court of Appeals in its orders of February 14, 1944 (R. 129, 139, 131), in effect held that it had jurisdiction under the Natural Gas Act to determine without supporting evidence that the burden of excessive rates paid by the local distributors involved for natural gas during the period, while the court's stay order was in effect, was borne by the ultimate consumers thereof, but that it was beyond its jurisdiction to determine the reasonableness of the rates between Central and its ultimate consumers dur-

ing that period. Section 1(b) of the Act (15 U.S.C. 717 (b)) expressly states that the Act shall not apply to the local distribution or sale of natural gas. In view of this provision it seems clear that it was equally beyond the jurisdiction of the Court of Appeals to determine that the burden of the excessive rates paid by the local distributors during the period of the stay order was borne by the ultimate consumers. Nevertheless the Court of Appeals on the basis of this determination awarded the fund involved to Central's ultimate consumers. In effect the court thereby assumed jurisdiction to and did retroactively reduce rates between Central, a local distributor, and its consumers. This action of the court appears to be contrary to the express provisions of the Natural Gas Act and the court has thereby decided an important question of federal law which has not been (so far as Central is informed) but should be settled by this Court.

C. It was the mandatory duty of the Court of Appeals to retain jurisdiction of and determine who was equitably entitled to the fund here in dispute.

The Court of Appeals in its opinion of May 22, 1942, decided that it was its mandatory duty to take jurisdiction over the refund to be made by the Natural Gas Companies in conformity with the bond filed by them to obtain the entry of the erroneous stay of the rate order of the Federal Power Commission (R. 45). On July 1, 1942, the refund was deposited in the registry of the court and it thereby acquired jurisdiction over the same (R. 64, 65). Notwithstanding the above mentioned opinion, the Court in its orders of February 14, 1944, denied Central's original petition on the ground that the issues presented thereby were beyond its jurisdiction and directed that the fund which had been allocated to Central's ultimate consumers

be turned over to their respective municipal representatives without prejudice to Central (R. 129, 130, 131). By these orders the court in effect refused to consider the equities of Central's claim to the fund which had been so allocated and shifted the responsibility for the determination of these equities to another tribunal. In *United States v. Morgan*, 307 U. S. 183, and in *Inland Steel Company v. United States*, 306 U. S. 153, this Court held that where a fund has accumulated subject to the jurisdiction of a federal court it is the duty of the court to retain control over the fund and distribute the same to the persons entitled thereto. The Court of Appeals by directing payment of the fund here involved to the municipal representatives of the ultimate consumers without hearing any evidence and without prejudice to Central refused to carry out its duty as announced by this Court. Accordingly, the decision of the Court of Appeals on Central's petitions is probably in conflict with the foregoing decisions of this Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is respectfully submitted that the prayer of the foregoing petition should be granted.

BERT L. KLOOSTER,

Attorney for Petitioner.

PERRY M. CHADWICK,

ROSCOE C. NASH,

Of Counsel.

APPENDIX.

PERTINENT SECTIONS OF THE NATURAL GAS ACT. **(15 U. S. C. 717.)**

Section 1. (15 U.S.C. 717.) (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. '83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2(6). (15 U.S.C. 717a(6).) When used in this chapter, unless the context otherwise requires—(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4. (15 U.S.C. 717c.) (a) All rates and charges made, demanded, or received by any natural-gas company

for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes or service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule

or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any state, municipality, or state commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: Provided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the

Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

PERTINENT SECTIONS OF THE CODE OF IOWA OF 1931

Chapter 312.

HEATING PLANTS, WATER OR GAS WORKS, AND ELECTRIC PLANTS.

6143 Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light, or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light, or power for other necessary public purposes and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat, and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device

or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution, or contract.

Chapter 329.

CITIES UNDER SPECIAL CHARTER.

6788 Heating, water, gas, and electric plants. Sections 6129 and 6134 to 6143, inclusive, and 6134.01 to 6134.11, inclusive, are applicable to cities acting under special charters.



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CHARLES ELMORE DROOPLY
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.,
Respondents.

**BRIEF FOR CENTRAL STATES ELECTRIC
COMPANY.**

BERT L. KLOOSTER,
Attorney for Petitioner.

PERRY M. CHADWICK,
ROSCOE C. NASH,
Of Counsel.



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Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591	25, 26, 42
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Public Utilities Commission v. Landon, 249 U.S. 236	19
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Southern Pacific Company v. Darnell-Taenzer Lumber Company, 245 U.S. 531	47
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA,
and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.,
Respondents.

**BRIEF FOR CENTRAL STATES ELECTRIC
COMPANY.**

INTRODUCTION.

This case is before this Court on certiorari to the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter called the "court below") granted on the petition of Central States Electric Company (hereinafter called "Central"). The decision under review denied Central's application for payment to it of a fund of \$25,708.54 on deposit with the Clerk of the court below. This fund represents amounts paid for natural gas by Central to Natural Gas Pipeline Company of America in

excess of rates fixed therefor by a valid rate reduction order of the Federal Power Commission during the period of an improper stay of that order by the court below and deposited with the Clerk of that court by Natural Gas Pipeline Company of America and Texoma Natural Gas Company pursuant to a bond given by them to obtain the stay.

OPINIONS BELOW.

The court below did not render any opinion directly on the orders denying the relief sought by Central, but that court did render opinions prior to Central's appearance in the case which are material here. Such of these opinions as are officially reported are as follows: opinion of May 22, 1942 (R. 36-46) 128 Fed. (2d) 481; opinion of June 26, 1942 (R. 55-56) 129 Fed. (2d) 515; opinion of June 30, 1942 (R. 60-63) 134 Fed. (2d) 263; and opinion of September 3, 1942 (R. 67-80) 131 Fed. (2d) 137.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347a).

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act of 1938 are set forth in Appendix A.

STATEMENT OF THE CASE.

Central during the period here involved (namely, from September 1, 1940, to March 31, 1942, which was the period of the stay by the court below of the rate reduction order of the Federal Power Commission (R. 51) and is hereinafter sometimes called the "refund period") was a corporation organized under the laws of the State of Iowa

and was engaged in the utility business in that State and elsewhere (R. 106). During this period Central purchased natural gas from Natural Gas Pipeline Company of America under contract with that Company (R. 109-110), which was then a natural gas company subject to the provisions of the Natural Gas Act and sold at wholesale the natural gas transported by it in interstate commerce to local distributors, such as Central, in Illinois, Iowa and elsewhere (R. 9, 10).

The issues presented hereby arise on the supplemental petition of Central for intervention (R. 106, 134) in proceedings ancillary to proceedings initiated by Natural Gas Pipeline Company of America and Texoma Natural Gas Company (hereinafter sometimes called the "Natural Gas Companies") in the court below under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) (R. 7-8). The original proceedings (identified below as Cause No. 7454) were filed to review an interim rate order entered on July 23, 1940, as amended by an order entered August 8, 1940, by the Federal Power Commission, which directed the Natural Gas Companies to reduce their rates on natural gas so as to reflect an annual reduction in their operating revenues of not less than \$3,750,000.00 and to make this reduction effective as to all bills regularly rendered on and after September 1, 1940 (R. 1-6, 7). The validity of this order was sustained by this Court in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, and this Court therein reversed the judgment of the court below vacating said order.

Prior to the commencement of Cause No. 7454 the Natural Gas Companies filed a petition in the court below, identified as Cause No. 7439, to obtain a temporary stay of the interim rate order pending the Natural Gas Companies' application for rehearing thereon before the Federal Power Commission (R. 32-35). Such a stay order

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was entered on August 30, 1940, in Cause No. 7439, which stay order provided, among other things, the following:

"That this order will become effective upon the execution and delivery to the Clerk of this court by petitioners of their joint and several bond in the penal sum of \$1,000,000, conditioned on their refunding to those who purchased natural gas from petitioners at wholesale, as their several interests appear, the amount represented by the reduction in revenues as directed by the Federal Power Commission in its order dated July 23, 1940, if the order last mentioned be sustained" (R. 34).

The foregoing temporary stay order was dissolved on November 1, 1940 (R. 35).

Also on November 1, 1940, a stay order was entered in Cause No. 7454 staying the interim rate order until the further order of the court (R. 28-29). On November 26, 1940, an order was entered in Cause No. 7454, and in Cause No. 7439, which provided that as a condition to said stay order the Natural Gas Companies should forthwith file their bond without surety in the penal sum of \$1,000,000.00, conditioned in all respects the same as the bond filed in Cause No. 7439 by the Natural Gas Companies (R. 29, 36).

On December 3, 1940, in conformity with the order of November 26, 1940, the Natural Gas Companies filed their bond in Cause No. 7454 conditioned as follows:

"The condition of this obligation is such that if the undersigned shall pay or cause to be paid to the purchasers at wholesale of natural gas from Natural Gas Pipeline Company of America as their several interests appear the amounts representing the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review of the order of the Federal Power Commission dated July 23, 1940, directing the undersigned, Natural Gas Pipeline Company of America, to

file new schedules of rates and charges to reflect a reduction of not less than \$3,750,000 per annum in the operating revenues of said Natural Gas Pipeline Company of America together with all costs which may be adjudged against them should said order last mentioned be sustained, then this obligation shall become null and void and of no further force and effect" (R. 29-30).

The aforesaid bond was approved by order entered on December 3, 1940 (R. 31).

On March 16, 1942, this Court rendered its decision (315 U.S. 575) sustaining the interim rate order of the Federal Power Commission, and the Natural Gas Companies thereupon became liable to refund, in accordance with their aforesaid bond, the amount paid to them in excess of the rates permitted by that order during the period of the stay thereof.

On May 22, 1942, which was prior to payment of the amount due on the bond, the court below filed an opinion deciding that it was its mandatory duty to take exclusive jurisdiction and control over the refund (when made) and to determine the rights of all claimants thereto (R. 36-46). An order was entered on June 24, 1942, pursuant to this opinion by which the court took jurisdiction of the refund and enjoined all claimants thereto from proceeding in any other court (R. 51-52). It appears from the opinion that the Natural Gas Companies had by petition sought the relief granted by the order on the ground that suits had been filed against them in other courts by some of the ultimate consumers of gas sold to such consumers by the local distributors thereof and that unless the court below retained jurisdiction of the refund they would be subjected to numerous similar suits (R. 37-38). The Illinois Commerce Commission filed an answer in response to the petition of the Natural Gas Companies in which it was alleged that the rates charged by the local distributors

in Illinois were fixed by said Commission and necessarily reflect the prices paid by the local distributors to the Natural Gas Companies and that the refund representing the excessive rates paid by the local distributors was collected from the ultimate consumers and was equitably due them (R. 38). The Illinois local distributors then before the court (which did not include Central) agreed that the refund should equitably be paid to the ultimate consumers who purchased gas from them (R. 38). Since Central was not a party to this agreement, it could only affect the relations between the local distributors who were parties thereto and the ultimate consumers who purchased gas from them.

On June 29, 1942, Central wrote a letter to the Clerk of the court below, in response to a letter from him, in which letter Central asserted that the portion of the refund representing excessive rates paid by it during the refund period should be repaid to it and not paid to the ultimate consumers (R. 56-59).

On June 30, 1942, the court below rendered a memorandum opinion in which it purported to weigh and consider the relative rights and interests in general of all local distributors and ultimate consumers in the refund (R. 60-63). As a result of this consideration the court found that since the rates charged by the local distributors to the ultimate consumers included the excess charges paid by the local distributors to the Natural Gas Companies, the ultimate consumers were, in equity, entitled to receive this excess which was to be refunded by the Natural Gas Companies (R. 62-63). In other words, the court found that the local distributors in general, as stated in its opinion, were "merely conduits, by which natural gas transported by" the Natural Gas Companies "was delivered to customers by utilities" (R. 62).

In making the aforesaid finding, which apparently was based on the allegations contained in the above mentioned answer of the Illinois Commerce Commission and disclaimers of interest in the refund filed by the Illinois local distributors involved (R. 47-50) (but not by Central), the court below assumed jurisdiction to review the contractual relations between the local distributors and the ultimate consumers and to adjudge their respective equities in and to the refund presumably on the conclusion, not supported by evidence, that the rates charged to the ultimate consumers during the refund period in all events included the excessive rates paid by the local distributors during that period to the Natural Gas Companies. In other words, the court found that the local retail rates charged by the local distributors during the refund period were illegal and excessive. In effect, the court below by determining what the contractual relations between the local distributors and the ultimate consumers were or should have been during the refund period and by finding that the refund equitably belonged to the ultimate consumers assumed jurisdiction to and did retroactively reduce the local rates of the local distributors during the refund period. This determination was made and declared by the court to be generally binding on all local distributors even though Central was not then a party to the cause and had never by any means agreed to a reduction of the rates which it charged its customers.

On July 1, 1942, the Natural Gas Companies, in accordance with their aforesaid bond, deposited with the Clerk of the court below the sum of \$6,377,913.52 (R. 64-65). This sum, exclusive of interest included therein, represented that part of the rates in excess of the rates permitted by the rate order paid to the Natural Gas Companies by the local distributors (including Central) for natural gas purchased by them from the Natural Gas Companies

during the refund period (R. 29, 30, 36, 37), namely, the period from September 1, 1940, to March 31, 1942.

Thereafter, in conformity with the aforesaid opinions of May 22, 1942, and June 30, 1942, the court below entered a show cause order which, among other things, (a) fixed the refund period as the period from August 1, 1940, to March 31, 1942, inclusive, (b) determined that the fund of \$6,377,913.52, less all fees, costs and expenses of distribution thereof, was the property of the ultimate consumers of the natural gas purchased by the local distributors from the Natural Gas Companies and was not the property of such local distributors, (c) allocated said fund to certain but not all of the ultimate consumers or customers of the various local distributors, including Central's ultimate consumers, who were allocated the sum of \$25,708.54, (d) found that industrial and home heating users of gas should not participate in the refund, (e) reserved jurisdiction of said fund for the purpose of protecting all persons having rights therein, and (f) directed all claimants to said fund to show cause why the order should not be binding on them (R. 67-80).

Notwithstanding the above opinions and orders, the court below expressly recognized that the same were not binding on Central by entering an order on November 24, 1942, in which it found that Central had raised an issue as to whether it or its consumers were entitled to the refund (amounting to \$25,708.54) and directed that such amount should be segregated from the remainder of the fund and dealt with separately (R. 81-82). This order undoubtedly was entered as a consequence of Central's above mentioned letter to the Clerk of the court below under date of June 29, 1942, since Central did not become a party to the proceedings until almost a year after the entry of this order.

On September 1, 1943, Central became a party to the proceedings by filing its petition in intervention (R. 106) with the court below praying that said sum of \$25,708.54 be paid to it and not to the ultimate consumers (R. 106-114½). Central was then granted leave to intervene (R. 115).

In said petition it is in substance alleged that Central had not theretofore been a party to these proceedings or to the proceedings before the Federal Power Commission (R. 106); that it purchased natural gas from Natural Gas Pipeline Company of America during the refund period under contract with that Company (R. 109-110); that said sum of \$25,708.54 represents amounts paid by Central for natural gas during the refund period in excess of the rates fixed therefor by the Federal Power Commission (R. 106); that Central sold more than 81% of the gas so purchased by it, without profit or advantage, to Iowa Electric Company, which resold the same to 2,432 consumers in Muscatine, Iowa (R. 107-108); that it sold the balance of such gas directly to 320 consumers in Greenfield, Iowa, to 590 consumers in Knoxville, Iowa, and to 366 consumers in Pella, Iowa (R. 108); that less than 12½% of the gas sold in Knoxville and Pella consisted of natural gas (R. 108); that Iowa Electric Company has transferred all its rights in and to said fund of \$25,708.54 to Central for the purpose of these proceedings (R. 108, 111-112); that by law in Iowa the power to fix rates for gas service is vested in its municipalities and utility operations in Iowa are not regulated by any state agency or commission (R. 107); that Iowa Electric Company (since 1932 when Central first purchased natural gas from Natural Gas Pipeline Company of America (R. 109)) from time to time voluntarily reduced gas rates in Muscatine in order to meet competitive conditions and to increase the volume of its business (R. 110, 107); that the rates

for natural gas prevailing between Iowa Electric Company and its consumers in Muscatine were approved by resolution of the Council of Muscatine (R. 110); that such rates as so approved remained static between August 6, 1936, and February 4, 1943 (R. 110, 112-114); and that due to competitive conditions in rural communities as contrasted with conditions in urban centers, Iowa Electric Company resold natural gas in Muscatine, Iowa, during the refund period at rates which were insufficient to produce a fair return on its investment (R. 107, 109-110, 114½).

On November 6, 1943, an order was entered on Central's petition which again recognized that the fund of \$25,708.54 had theretofore been segregated by the court below from the total fund and ordered to be dealt with separately (R. 115). This order directed that the Attorney General of the State of Iowa and the purchasers of natural gas from Central and their respective municipal representatives in Muscatine and Greenfield be notified of Central's claim to the fund and that they show cause why the relief sought by Central should not be granted (R. 115-116). A copy of this order was published in Muscatine and Greenfield (R. 124, 125). Apparently the court through oversight did not require notice of Central's petition to be given to the consumers in Knoxville and Pella or to any of the public officials in those cities.

Pursuant to the aforesaid order and notice thereof, Muscatine and the Mayor of Greenfield, purporting to represent the consumers in those cities, filed separate pleadings in response to the petition of Central in which they asserted that the fund of \$25,708.54 belongs to such consumers (R. 116-121, 122-123, 126-128).

In the pleadings of Muscatine it is in substance alleged that Muscatine is a municipal corporation existing by special charter granted by the Legislature of the State of

Iowa (R. 117); that the rates for gas service in Muscatine during the refund period were fixed by agreement with Iowa Electric Company and approved by ordinance adopted by the Council of Muscatine (R. 117); that Exhibit 2 attached to Central's petition correctly states the gas rates in Muscatine as fixed by ordinances of its Council adopted at various dates between July 9, 1932, and February 4, 1943 (R. 117); that Muscatine had not theretofore been a party to these proceedings (R. 117); that Iowa Electric Company failed to divulge to Muscatine or the ultimate consumers that the wholesale rates for natural gas had been reduced by the Federal Power Commission or that the decree of the court below of September 3, 1942, had allocated the fund of \$25,708.54 to the ultimate consumers (R. 117-118); that neither Muscatine nor the ultimate consumers had prior knowledge of these proceedings, the aforesaid rate reduction, or the allocation of said fund of \$25,708.54 to them (R. 117, 118); that Muscatine appears in these proceedings as the representative of the consumers of gas in that city whose names are unknown to it (R. 118); that the facts alleged in Central's petition regarding the failure of Iowa Electric Company to earn a fair return on its investment during the refund period are untrue (R. 119-120); and that since Iowa Electric Company voluntarily agreed to the rates prevailing between it and its consumers during the years 1932 to 1943, it is now estopped to assert that such rates were insufficient to produce a fair return on its investment (R. 126-128).

The pleadings of the Mayor of Greenfield cannot properly be said to present issues in addition to those presented by the pleadings of Muscatine (R. 122, 123).

On February 14, 1944, the court below without hearing any evidence in support of Central's petition entered an order denying the same "without prejudice" to Central's

"making claim of adjustment with the Cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa, or with the consumers of gas furnished by it in said Cities" (R. 129). The bases of this order as recited by the court therein were that it was without jurisdiction to hear Central's claim since it involved a determination of "the reasonableness of petitioner's rates" and that the court had previously ruled that the refund made by the Natural Gas Companies belonged to the ultimate consumers (R. 129).

In a separate order entered on the same day the court below directed that the sum of \$25,708.54 be paid to the Treasurers of the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, in various amounts (R. 130-131). Apparently the court in fixing the amount payable to each municipality allocated 81% of the fund to Muscatine because Central's petition alleged that Iowa Electric Company sold more than 81% of the gas purchased by Central from Natural Gas Pipeline Company of America to consumers in that city, and divided the balance of the fund between the other three municipalities on the basis of the number of consumers in each of those cities as set forth in Central's petition. In so allocating the fund it is obvious that the court below failed to give consideration to the fact alleged in Central's petition that less than 12½% of the gas sold in Knoxville and Pella during the refund period consisted of natural gas. As grounds for its said order, the court stated therein that the fund of \$25,708.54 belonged to the ultimate consumers of gas residing in the Cities of Muscatine, Greenfield, Knoxville and Pella, Iowa, and that the court desired to pay said fund at the earliest possible time "to such parties as are entitled to the same and to permit of a determination of said rights by a court or body having jurisdiction thereof" (R. 130).

By the aforesaid orders of February 14, 1944, the court below, while disclaiming jurisdiction, nevertheless assumed jurisdiction to award said sum of \$25,708.54 to the ultimate consumers and thereby retroactively reduced their rates during the refund period. This necessarily involved a finding that the retail rates prevailing during the period, as fixed by the ordinances of the four municipalities involved, were exorbitant and excessive and resulted in a fixing of such rates by the court. Such action apparently was taken on the basis announced by the court in its opinion of June 30, 1942 (R. 60-63), to the effect that the excessive rates paid by the local distributors (including Central) to the Natural Gas Companies during the refund period were included in the rates paid by the ultimate consumers during that period. Also this decision was made notwithstanding Central's claim that in its particular case the excessive rates paid by it to the Natural Gas Pipeline Company of America during the refund period were not included in the rates paid by the ultimate consumers in Muscatine during that period inasmuch as Iowa Electric Company did not then earn a fair return on its investment (R. 109-111, 114½).

On March 11, 1944, Central filed its supplemental petition setting forth additional grounds for the payment to it of said sum of \$25,708.54 (R. 133-134). This supplemental petition shows as grounds for payment to Central of said sum that:

1. Central was legally entitled to payment of said sum because (a) said sum represented excessive rates paid by Central to Natural Gas Pipeline Company of America, which except for the stay order entered by the court below would have been retained by Central; (b) the rate order of the Federal Power Commission reduced the rates prevailing between Central and Natural Gas Pipeline Company of America, and

Central as the only party in privity with said Company was entitled to the benefit of the rate reduction; and (c) the aforesaid bond filed by the Natural Gas Companies to procure the stay order was conditioned on repayment of the excessive rates to the purchasers at wholesale (namely, the local distributors, including Central) (R. 134-139).

2. The court below was without jurisdiction to award said sum to Central's ultimate consumers because (a) awarding said sum to them was tantamount to a retroactive reduction of the rates between Central and its ultimate consumers during the refund period, and the court decided by its orders of February 14, 1944, that it was without jurisdiction to determine the reasonableness of local rates; (b) the Natural Gas Act by its express terms does not apply to the local distribution of natural gas or to the facilities used for such distribution; and (c) the jurisdiction and powers of the court below in these proceedings are not only derived from but are limited by the terms of the Natural Gas Act, which denies any jurisdiction over the transportation or sale of natural gas between a local distributor and its ultimate consumers (R. 134-139).

3. It was inequitable for the court below to award said sum to Central's ultimate consumers because (a) the court's finding that such consumers were equitably entitled to said sum was based on a conclusion of fact (unsupported by any evidence whatsoever) that the burden of the excessive rates paid by Central to Natural Gas Pipeline Company of America during the refund period had been passed on by it to such consumers who had paid the same; and (b) the court disclaimed jurisdiction (on the theory that it was beyond its power to determine the

reasonableness of local rates) to hear any evidence in support of Central's claim that it was equitably entitled to said sum because it and not the ultimate consumers had borne the burden of such excessive rates, yet the court at the same time inconsistently assumed jurisdiction to determine that the ultimate consumers had borne the burden of such excessive rates (R. 134-139).

Muscatine and the Mayor of Greenfield filed responses to Central's supplemental petition in which they alleged that the fund of \$25,708.54 belonged to the ultimate consumers for the reason that the rights of Central therein had been concluded by the decree of the court below of September 3, 1944, awarding the entire refund to the ultimate consumers (R. 140-143).

Central was granted leave to file its supplemental petition and the same was denied on March 28, 1944, without any hearing or argument on the issues raised thereby (R. 146).

Muscatine and the Mayor of Greenfield do not allege in their respective pleadings that the ultimate consumers paid rates to Central during the refund period in excess of those fixed by their respective ordinances; that the rates as so fixed were exorbitant and excessive; or that the ultimate consumers did not voluntarily pay such rates (R. 116, 122, 126, 140-144).

Neither Knoxville nor Pella nor the ultimate consumers therein made any claim in these proceedings to any part of said fund of \$25,708.54 and no pleadings were filed herein by or on their behalf.

SPECIFICATION OF ERRORS.

Central in its petition for the writ of certiorari specified the questions as follows (Pet. 12, 13, 14):

1. Whether under the Natural Gas Act a purchaser at wholesale of natural gas from a natural-gas company is entitled, as a matter of legal right, to a return of rates paid therefor by the purchaser to such company in excess of the rates fixed by a valid order of the Federal Power Commission during the period of a stay of such order by a Federal court?

2. Whether under the Natural Gas Act a Federal court can deprive a wholesale purchaser of natural gas from a natural-gas company of the benefit of a valid rate reduction order of the Federal Power Commission by staying such order and after determination that such stay is erroneous then direct that the fund representing the excessive rates paid by the wholesale purchaser to the natural-gas company as a result of the stay be turned over to the ultimate consumers of such gas and not returned to the wholesale purchaser?

3. Where funds are paid into the registry of a Federal court pursuant to a bond deposited to obtain a stay of a rate order of the Federal Power Commission, which bond is conditioned for repayment to the purchaser at wholesale of natural gas from a natural-gas company in the event the stay on review appears to be erroneous, and such event occurs, may a Federal court nevertheless direct the payment of such funds to the ultimate consumers of such gas rather than to the purchaser at wholesale?

4. Whether under the Natural Gas Act a Federal court denying its own jurisdiction may nevertheless in effect exercise jurisdiction to inquire into and regulate the contractual relationship between a local

distributor of natural gas and the ultimate consumers of such gas?

5. Whether under the Natural Gas Act a Federal court has jurisdiction to retroactively reduce rates between a wholesale purchaser of natural gas from a natural-gas company and the ultimate consumers of such gas by awarding to such consumers a fund deposited in the registry of the court as the result of an erroneous stay of a valid order of the Federal Power Commission reducing rates between the natural-gas company and the wholesale purchaser?

6. Whether under the Natural Gas Act a Federal court which has erroneously stayed a valid rate reduction order of the Federal Power Commission and thereby caused a fund to be deposited in its registry may thereafter when its stay has been found erroneous determine, without a hearing or the presentation of evidence of any kind and while disclaiming any jurisdiction in the matter, that the fund represents excessive rates paid by the ultimate consumers of the natural gas involved and that they rather than the wholesale purchaser of such gas are equitably entitled to said fund?

7. Whether under the Natural Gas Act a Federal court which by exercise of its equitable powers has caused a fund to be deposited in its registry may thereafter refuse to determine finally the rights of adverse claimants to the fund and turn the same over to one of the rival claimants and compel the other rival claimant to resort to some other tribunal to have its asserted rights adjudicated?

8. Whether a Federal court may order the payment of a fund, which belongs either to a wholesale purchaser of natural gas or to the ultimate consumers thereof and is on deposit in its registry, to an Iowa municipal corporation which under the laws of that

State is without authority to receive, administer or distribute such fund?

9. Whether a Federal court may direct the payment of a fund on deposit in its registry to parties not subject to its jurisdiction and who have failed to claim such fund in response to a show cause order entered by the court?

Generally stated, Central's contentions on the above questions are that the court below by its orders of February 14, 1944 (R. 129, 130, 131) and March 11, 1944 (R. 146) erred in the following respects:

1. By awarding the fund of \$25,708.54 to the ultimate consumers of the natural gas sold by Central during the refund period, because such action (a) disregarded the cooperative dual system of regulation by the Federal and State Governments provided for in the Natural Gas Act and interfered with the power reserved to the States by the Constitution and (b) constituted the fixing of local retail rates for natural gas which was beyond the jurisdiction of the court below and involved the usurpation by a judicial body of the legislative function of fixing such rates;

2. By failing to hold that said fund belongs to Central as a matter of legal right, because such result is required (a) by the provisions of the Natural Gas Act, (b) by the applicable common law principles, and (c) by the terms of the bond filed by the Natural Gas Companies to obtain the stay order entered by the court below;

3. By directing payment of said fund to the four municipalities involved, because such action disregarded the mandatory duty of the court below to exercise its limited jurisdiction to adjudicate Central's rights in said fund.

ARGUMENT.

I.

THE TRANSPORTATION AND SALE OF NATURAL GAS IS REGULATED BY THE FEDERAL AND STATE GOVERNMENTS THROUGH A COOPERATIVE DUAL SYSTEM UNDER WHICH THE FEDERAL GOVERNMENT EXERCISES EXCLUSIVE POWER TO REGULATE TRANSPORTATION AND SALE IN INTERSTATE COMMERCE AND THE STATES EXERCISE EXCLUSIVE POWER TO REGULATE LOCAL RETAIL DISTRIBUTION.

A. Prior to the enactment of the Natural Gas Act the principle was well established by case law that the Federal power of regulation was limited to interstate transportation and sale of natural gas and that local distribution at retail was subject to the control of the several States.

Prior to the enactment of the Natural Gas Act (enacted June 11, 1938) this Court established the principle that regulation of the local distribution and sale of natural gas by local utilities was a matter subject to control by the several States (in so far as such regulation did not violate the Fourteenth Amendment of the Constitution) and that such regulation did not constitute interference with the power of Congress under the interstate commerce clause of the Constitution. Thus in *Public Utilities Commission v. Landon*, 249 U.S. 236, this Court held that an interstate carrier of natural gas which sold the same, at a price equal to two-thirds of the retail price thereof, to independent local distributors operating under special municipal ordinances was not entitled to any relief from the retail rates therefor fixed by the local regulatory bodies. This decision was premised on the ground that the inter-

state movement ended when the natural gas passed into the local mains of the independent local distributors and that the local rates as fixed by the local regulatory bodies, although not compensatory so far as the interstate carrier was concerned, did not interfere with interstate commerce.

Also, prior to June 11, 1938, this Court established the principle that the several States could not regulate the interstate transportation and sale of natural gas, inasmuch as such regulation constituted an unreasonable interference with the power of Congress under the commerce clause of the Constitution, even though Congress had not legislated in this particular field. This principle was announced in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298. Therein it was held that the local regulatory bodies of Kansas and Missouri could not regulate the rates at which an interstate carrier of natural gas sold the same to local distributors, as such action placed an unreasonable burden upon interstate commerce.

Additional decisions of this Court amplifying the principles stated above are:

Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23;

Peoples Natural Gas Company v. Public Service Commission, 270 U.S. 559;

State Corporation Commission v. Wichita Gas Company, 290 U.S. 561.

B. State legislation regulating the local distribution at retail of natural gas was enacted in most States prior to the passage of the Natural Gas Act.

As early as 1876 this Court recognized the right and power of the several States to regulate local businesses affected with a public interest, even though such regulation indirectly operated upon interstate commerce (*Munn v. People of Illinois*, 94 U.S. 113). As a result of this

recognition, regulation by the States of the local distribution and sale of natural and artificial gas by local utilities became firmly established in their legislation. This regulation is embodied in legislative acts whereby the State Legislatures usually delegated their regulatory power to commissions exercising statewide control or to their respective municipal corporations (McQuillin, *Municipal Corporations*, 2d Edition, Revised Volume 4, Sections 1875, 1876), and this legislation has been constantly improved and extended according to the requirements of experience and changing circumstances. Thus at the time the Natural Gas Act was passed the several States had already created machinery fully competent to deal with the local distribution and retail sale of natural gas to the ultimate consumers, and this Court will take judicial notice of the State statutes creating the same (*Cheever v. Wilson*, 76 U.S. 108).

The Legislature of Iowa has delegated to its municipalities the power to regulate the local distribution and retail sale of natural gas. Under Section 6143 of the Iowa Code of 1939 (App. B 62), which was passed long prior to the Natural Gas Act, Iowa municipalities are vested with the exclusive power "to regulate and fix the rents or rates of water, gas, heat and electric light or power," and it is therein provided that this power shall not be abridged by ordinance, resolution or contract. Thus at the time of the effective date of the Natural Gas Act, as will hereinafter be more fully discussed, the State of Iowa had machinery existing for regulation of the rates at which natural gas might be sold to inhabitants of municipalities at retail.

C. The Natural Gas Act expressly restricts the power of Federal regulation to the transportation and sale of natural gas in interstate commerce and does not apply to local distribution.

It is clear from the legislative history of the Natural Gas Act that Congress intended thereby to complement and in no manner to usurp State regulatory authority. Any doubt whatsoever as to the intention of Congress in this regard is set at rest by House Report No. 709, 75th Congress, 1st Session, at pages 1 to 3. Therein the House Committee on Interstate and Foreign Commerce when it recommended the Act for passage by Congress stated as follows:

" * * * It (the bill) confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U.S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Company* (1924), 265 U.S. 298, and *Public Service Commission v. Attleboro Steam and Electric Company* (1927), 273 U.S. 83.)

The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.

• • •

• • • • The bill takes no authority from the State commissions and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies. • • •

• • •

“Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions.

“In view of the importance of section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows: ‘but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.’ The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to ‘the local distribution of natural gas’ is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

"It was urged in connection with earlier bills that there should be inserted at the end of this subsection a proviso as follows: 'Provided, That nothing in this Act shall be construed to authorize the commission to fix the rates or charges to the public for the sale of natural gas distributed locally.' In order to avoid misunderstanding the committee thought it necessary to omit this proviso from the present bill for the following reasons, even though there is entire agreement with the intended policy which would have prompted its inclusion: First, it would have been surplusage if interpreted as it was intended to be interpreted, and, second, it would have been, in all likelihood, a source of confusion if interpreted in any other way: For example, it was felt that in the effort to find a reason for its inclusion it might have been argued that it exempted sales to a publicly owned distributing company, and such an exemption is not, of course, intended. It is believed that the purposes of this proviso, assuming the need for any such provision, are fully covered in the present provision by the language—'but shall not apply to any other * * * sales of natural gas.' "

Section 1(b) of the Natural Gas Act (15 U.S.C., 717(b)) provides that the same "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution * * *." As indicated in House Report 709, the negative portion of Section 1 (b) of the Act was inserted by Congress for the express purpose of avoiding any possible contention that the Act was intended to vest in the Federal Power Commission authority to regulate local retail sales of natural gas. Therefore, it is settled beyond question that the power and authority of the

Federal Power Commission is limited by the Act to the transportation and sale of natural gas in interstate commerce.

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498;

Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456;

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591.

D. The Federal and State Governments, each exercising exclusive power and authority in their respective spheres, regulate the transportation and sale of natural gas by a dual system under which the Federal regulation of transportation and sales in interstate commerce is intended to be complementary to the State regulation of local distribution.

Not only is it plain from the express language of the Natural Gas Act and the legislative history thereof that it was not intended to give the Federal Power Commission any power or authority to regulate local retail sales of natural gas but also it is clear therefrom that the Act contemplates a cooperative dual system of regulation over the transportation and sale of natural gas by the Federal and State Governments, each exercising exclusive power and authority in their respective spheres. These principles have already been firmly established by this Court. Thus in *Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456, it is stated at page 467:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the

extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess.”

The plan of cooperative dual regulation by the Federal and State Governments is further developed and explained by this Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, wherein it is said at pages 609 and 610:

“We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, ‘through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.’ As stated in the House Report the ‘basic purpose’ of this legislation was ‘to occupy’ the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 68 L. ed. 1027, 44 S. Ct. 544, and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 71 L. ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong. 1st Sess. p. 2. In accomplishing that purpose the bill was designed to take ‘no authority from State commissions’ and was ‘so drawn as to complement and in no manner usurp State regulatory authority.’ *Id.* p. 2. And the Federal Power Commission was given no authority over the ‘production or gathering of natural gas.’ § 1(b).”

The plan of cooperative action between Federal and State Governments is established by numerous provisions of the Natural Gas Act. Section 2(8) of the Act (15 U.S.C.

717a (8)) provides that " 'State commission' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality." Section 5(a) (15 U.S.C. 717d (a)) provides that "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: * * *." Section 13 (15 U.S.C. 717L) provides that "Any State, municipality or State Commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this chapter may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission." Section 14a (15 U.S.C. 717m(a)) provides that the Commission may in its discretion make available to State commissions and municipalities, information concerning any matter under investigation by the Commission. Section 15a (15 U.S.C. 717n(a)) provides that " * * * In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commis-

sion, municipality or any representative of interested consumers * * *." Section 17(b) (15 U.S.C. 717p(b)) provides that "The Commission may confer with any State Commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act." and that "The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records and facilities as may be afforded by any State commission."

From the foregoing provisions of the Act the pattern of dual regulation by the Federal and State Governments over the whole course of transportation and sale of natural gas for public use is perfectly clear. The rights of consumers are protected by State regulation of retail distribution to consumers by local distributors, and in order that such distributors, whose operations are under State control, will be able to purchase their supplies of natural gas (delivered to them in the course of interstate commerce) at reasonable rates, Federal regulation steps in where the State power ends and exerts control over the operations of a natural-gas company in order to make certain that its rates to the local distributors are reasonable.

While both Federal and State legislation providing for regulation of the transportation and sale of natural gas is admittedly enacted in the public interest and for the ultimate benefit of the public consumers, nevertheless it is apparent from the various provisions of the Federal legislation discussed above that it was the intention of Congress thereby only to regulate the interstate phase of such transportation and sale and to leave the intra-

state phase for control by the several States through regulatory bodies established by their legislation. A dual system of regulation has therefore been enacted by the Federal and State Governments covering separate fields of jurisdiction, both of which go to make up a harmonious, cooperative and complete system of regulation and yet at the same time carefully preserving the right of the Federal and State Governments to control their respective spheres.

II.

THE COURT BELOW DID NOT HAVE JURISDICTION TO DETERMINE A CLAIM ON BEHALF OF THE CONSUMERS WHERE SUCH DETERMINATION REQUIRED THE COURT TO PASS UPON THE REASONABLENESS OF AND FIX LOCAL RETAIL RATES.

A. The decision of the court below finding that the fund in its possession belonged to the ultimate consumers necessarily involved a finding that the rates paid by the ultimate consumers to Central during that period were unreasonable and constituted fixing local retail rates.

As previously stated herein, the court below in its memorandum opinion of June 30, 1942, purported to fix the relative rights and interests in general of all local distributors and ultimate consumers in and to the total refund made by the Natural Gas Companies (R. 60-63). In the course of that opinion the court stated as follows:

"Associated with this problem of costs, one utility serving Nebraska City asks that the refund go to it and not to its customers. That it and others may know and plan accordingly, we express our conclusion, and our holding, which is *all refunds which petitioners must make, belong to the consumers, for whose*

benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities. * * * (R. 62).

Although the above ruling was made more than a year prior to the time when Central became a party to the cause by filing its original petition (R. 106), nevertheless, it formed the basis for the order denying Central's original and supplemental petitions (R. 129-131, 146).

Thus in the first order entered on February 14, 1944, the court below denied Central's original petition asking that the fund of \$25,708.54 be paid to it for the reason that the court had " * * * previously ruled that the refund made by Natural Gas Pipeline Company of America and Texoma Natural Gas Company belonged to the consumers of gas supplied by customers of said Natural Gas Pipeline Company of America and Texoma Natural Gas Company, * * * " (R. 129).

In the second order entered on the same date the court below directed payment of the fund in various amounts to the Treasurers of the four municipalities involved on the ground that " * * * said refund belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield and Knoxville and Pella, all of the State of Iowa; * * * " (R. 130, 131).

On March 28, 1944, Central filed its supplemental petition (R. 134-139) raising the points on which certiorari was sought and granted. This petition was denied by the court below without assigning any reasons therefor (R. 146).

From the foregoing statement of the findings and rulings made in the orders denying Central's petitions it is apparent that the court below intended to and did award

the fund in dispute to the Treasurers of the four municipalities as representatives of the ultimate consumers. So far as Central was concerned, the award was made to its adverse claimants to the fund and the statements contained in the two orders of February 14, 1944, to the effect that the award was made without prejudice to Central's right to claim the fund before some other court or body (R. 129, 130) is meaningless since in any proceedings instituted by Central in Iowa it would immediately be contended that the court below had adjudicated that the fund belonged to the consumers. Moreover, the final order entered by the court denying Central's supplemental petition (R. 146), in which Central claimed the fund as a matter of legal right and raised the question of lack of jurisdiction of the court to award the fund to the consumers, denied Central's claim with prejudice and has the effect of being *res judicata* as to the points presented in Central's supplemental petition. The court below thereby awarded the fund absolutely to the consumers.

As a consequence of the orders denying Central's petitions the court below, while disclaiming jurisdiction to hear Central's claim to the fund (on the pretext that such involved a determination of the reasonableness of Central's rates), nevertheless exercised jurisdiction to award the fund to the ultimate consumers presumably on the ground that Central's rates were excessive during the refund period. This award is based on the conception that the fund belonged to the consumers because the rates paid by them to Central during the refund period as a matter of law included the excessive rates paid by Central to Natural Gas Pipeline Company of America during that period. Therefore, the decision necessarily involves a finding that the rates paid by the ultimate consumers to Central during the refund period were unreasonable and this in turn results in fixing local retail rates during the period.

B. The jurisdiction conferred on the court below by the Natural Gas Act is restricted to review of orders entered by the Commission.

The jurisdiction and powers of the court below are not only derived from but are limited by the terms of the Natural Gas Act (*Natural Gas Pipeline Co. of America v. Federal Power Commission*, 328 Fed. 2d. 481, at page 483). The only provisions of the Act conferring jurisdiction on Courts of Appeal are subsections (b) and (c) of Section 19 thereof (15 U.S.C. 717r(b) and (c)). Subsection (b) provides that "Any party to a proceeding under this Chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia * * *" and subsection (c) provides that " * * * The commencement of proceedings under subsection (b) of this Section shall not unless specifically ordered by the court, operate as a stay of the Commission's order."

The only provision of the Act conferring jurisdiction on the Federal Power Commission to fix rates is Section 5(a) thereof (15 U.S.C. 717d(a)), which provides:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly dis-

criminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

It is apparent from the foregoing provisions that the jurisdiction of Courts of Appeal is expressly limited to review of orders of the Commission, which orders are in turn limited to fixing rates paid by local distributors to a natural-gas company. Moreover, the scope of judicial review under Section 19(b) of the Act has been strictly limited to that defined in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575. Therein this Court said at page 586:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

In view of the foregoing statement of this Court, it is clear that the jurisdiction granted by the Natural Gas

Act to Courts of Appeal on review of rate reduction orders of the Commission ends when it has been determined that the rate so fixed by the Commission is not confiscatory in the constitutional sense.

In considering the scope of judicial review of orders of the Commission by Courts of Appeal it is important not only to examine the affirmative provisions of the Natural Gas Act with respect thereto, but also to observe what the Act fails to do. Thus, the Act does not contain any provisions authorizing the Commission to fix interstate rates retroactively. It only permits the Commission to fix just and reasonable interstate rates to be "*thereafter observed*" (Section 5(a), 15 U.S.C. 717d (a)). Furthermore, the Commission is not vested with any authority to make reparation awards to persons injured as a result of violations of the Act. Certainly in view of these significant omissions from the Act and the limitations placed on judicial review by this Court in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, it is indisputable that the court below was without jurisdiction under the Natural Gas Act to make reparation awards to ultimate consumers of natural gas, especially when such action necessarily involved a finding that the rates paid therefor by such consumers were illegal and excessive and a determination equivalent to retroactively fixing local retail rates for such gas.

C. Under the Iowa Statutes the four municipalities involved were vested with exclusive power to regulate local retail rates for natural gas.

As indicated under sub-point B of point I of this Argument, the legislature of Iowa has delegated its power to fix local rates for natural gas to its municipalities. Such delegation is effected by Section 6143 of the Code of Iowa of 1939 (App. B 62). This section provides that cities

and towns " * * * shall have power to require every individual or private corporation operating such works or plant, * * * to furnish any person applying therefor, * * * with gas, heat, water, light or power, * * * ; to regulate and fix the rents or rates of water, gas, heat and electric light or power; * * * and these powers shall not be abridged by ordinance, resolution, or contract."

In construing the foregoing statute, the Supreme Court of Iowa has laid down various principles which are pertinent here. Thus in *City of Tipton v. Tipton Light & Heating Co.*, 157 N.W. 844, it is held that the Legislature has the power to regulate the rates and charges of corporations rendering public service, and that it may delegate this power to its municipalities. Also it is held therein that rates fixed by a municipal ordinance pursuant to the statute constitute the maximum and minimum rates, that the rates as so fixed are presumptively reasonable, and that if such rates are attacked on the ground that they are unreasonable the only question which a court can consider is whether the enforcement of the rates will operate to deprive the utility of fair compensation for its services. In *Iowa Ry. & Light Co. v. Jones Auto Co.*, 164 N.W. 780, the Supreme Court of Iowa also held that the power vested in municipalities by the statute to regulate and fix rates of compensation *thereafter to be exacted* is a continuing one and can not be abridged by ordinance, resolution or contract.

The foregoing principles are affirmed and re-stated in the following decisions by the Supreme Court of Iowa:

Town of Williams v. Iowa Falls Electric Co.,
170 N.W. 815;

Knotts v. Nollen, 218 N.W. 563;

Incorporated Town of Mapleton v. Iowa Public Service Co., 223 N.W. 476.

The above decisions clearly establish that an Iowa municipality in fixing rates by ordinance is exercising a legislative function which may not be interfered with by the courts unless the rates as so fixed are confiscatory in the constitutional sense. They further clearly establish that the ordinance rates are presumptively valid and that the burden of proof is on him who attacks the same to show that they are confiscatory. Also, it is settled by the Iowa decisions that the ordinance rates are the only rates which may be charged by a private public utility, that the municipalities may only fix rates prospectively, and that no limitation may be imposed by contract on the power to change these rates from time to time. Further it is apparent from the face of the statute that power to make reparation awards or to receive, administer or distribute the fund here in dispute is not thereby vested in Iowa municipalities.

- D. The Court below in exercising ancillary jurisdiction to dispose of the fund in its possession did not have jurisdiction to determine the reasonableness of or to fix rates paid by ultimate consumers to Central during the refund period, since this function is reserved to the several States and is not within the judicial power conferred upon Federal courts by the Constitution.**

As shown under sub-point B of point II of this Argument, Section 19(c) of the Natural Gas Act (15 U.S.C. 717r(c)) confers jurisdiction on Federal Courts of Appeal to stay orders of the Commission and, of course, such courts have inherent equity jurisdiction to impose reasonable conditions to granting a stay and to distribute funds accumulated in their possession, as a result of a stay, to the persons entitled thereto. This inherent equity jurisdiction does not, however, include jurisdiction to interfere with the power reserved to the States to fix local retail rates or to engage in the legislative function of fixing rates.

Thus in *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U.S. 264, this Court held that a Federal district court could not, as a condition to granting relief against confiscatory local rates for natural gas fixed by the Kentucky Commission, impose requirements which resulted in a fixing of local rates by the district court. In this case, as in the instant case, the district court had funds in its possession representing rates charged ultimate consumers for natural gas in excess of those fixed by the Kentucky Commission. In respect of this fund, this court ruled that it was erroneous for the district court to require such funds to be distributed to the ultimate consumers until after the Kentucky Commission had exercised its power to fix just and reasonable rates. The reasoning on which this ruling is premised is expressed at pages 271 and 272 as follows:

"There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton v. Consolidated Gas Co.*, *supra*; *Reagan v. Farmers' Loan & T. Co.*, 154 U.S. 362, 397, 38 L. ed. 1014, 1023, 14 S. Ct. 1047, 4 Inters. Com. Rep. 560; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U.S. 282, 53 L. ed. 186, 29 S. Ct. 55; cf. *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 67 L. ed. 731, 43 S. Ct. 445; *O'Donoghue v. United States*, 289 U.S. 516, 77 L. ed. 1356, 53 S. Ct. 740.

This Court has warned that the power to attach conditions to decrees enjoining state rates should be cautiously exercised. *Newton v. Consolidated Gas Co.*, *supra* (258 U.S. 175, 66 L. ed. 547, 42 S. Ct. 264). The

practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative functions is not a proper exercise of the discretionary powers of a federal court of equity. See *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U.S. 282, 53 L. ed. 186, 29 S. Ct. 55, *supra*."

In *Newton v. Consolidated Gas Co.*, 258 U.S. 165 (cited in the foregoing quotation) it was held error for a district court in enjoining a confiscatory rate for gas fixed by a New York statute to impose as a condition to injunctive relief that all collections in excess of 80¢ per thousand cubic feet for gas be impounded for ultimate distribution in accordance with any rate thereafter to be established by competent authority of the State of New York. In this connection, this Court at pages 176, 177 and 178 said:

"In No. 258, the Gas Company complains of the limit of \$1.20 per thousand cubic feet up to March 1, 1921, as a condition to continuation of the injunction, and also because sums above 80 cents per thousand were impounded for ultimate distribution in accordance with any rate which might be fixed thereafter by competent state authority.

It was within the court's discretion to grant the injunction upon terms, and we cannot now say that the limitation upon charges amounted to abuse. But grave injustice may result from action of this kind, and the power should be very cautiously exercised. See *Morrell v. Brooklyn Borough Gas Co.* (July 14, 1921) 231 N.Y. 398, 132 N.E. 129. It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate.

Rate making is no function of the courts, and should not be attempted, either directly or indirectly. After declaring the 80-cent rate confiscatory, the court should not have attempted, in effect, to subject the company for an indefinite period to some unknown rate to be proclaimed in the future, upon consideration of conditions then prevailing.

* * *

All impounded funds should be promptly released to the Gas Company, subject only to deductions for such costs as are clearly assessable to the prevailing party. * * *

In view of the foregoing decisions, it must be concluded that a Federal court, even though exercising ancillary jurisdiction over a fund in its possession, does not have authority to limit in any way the power reserved to the States to govern purely local matters or to usurp legislative functions.

If the principles announced by this Court in *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U.S. 264, are applied to the instant case, it must follow that the court below was without jurisdiction to award the fund here in dispute to the ultimate consumers, since the making of the award resulted not only in interference with the reserved power of the State of Iowa but also with the legislative function of the four Iowa municipalities involved to fix local retail rates. As shown above, Iowa municipalities are vested with the exclusive right to fix such rates and the courts of Iowa will not interfere with this legislative function unless the exercise thereof results in confiscation. These principles have even been announced and followed by the court below in *Natural Gas Pipeline Co. v. Federal Power Commission*, 141 Fed. 2d 27.

III.

THE COURT BELOW DISREGARDED THE COOPERATIVE DUAL SYSTEM OF REGULATION BY THE FEDERAL AND STATE GOVERNMENTS PROVIDED FOR IN THE NATURAL GAS ACT BY AWARDING THE FUND HERE IN DISPUTE DIRECTLY TO THE ULTIMATE CONSUMERS.

While the Natural Gas Act admittedly was enacted in the public interest, nevertheless it is likewise clear from the provisions of the Act (as demonstrated under sub-point D of point I of this Argument) that Congress did not thereby intend to accomplish more than regulation of the interstate phase of transportation and sale of natural gas and that it did not intend to invade the field of State regulation over retail sales of such gas. Further, it is apparent from the provisions of the Act that the benefits arising from the administration thereof were intended to accrue to the ultimate consumers only as a result of complementary action by State regulatory bodies.

The method whereby the public interest inherent in the Natural Gas Act is protected under the cooperative dual system of regulation contemplated thereby is self evident. Thus in actual practice a reduction by the Federal Power Commission in interstate rates paid by a local distributor to a natural-gas company may result in such a saving to the distributor that it will be required to pass on the saving, or at least a part thereof, to its retail purchasers from and after the time when the State regulatory body having jurisdiction of retail rates (upon consideration of all of the numerous factors involved in rate making) fixes a new schedule of rates to be charged by the distributor.

Of course, the reduced cost of natural gas to a local distributor is one of the factors to be taken into consideration by a State regulatory body in fixing retail rates, but it is not the only factor, since other operating expenses, the original cost of construction of the local distributor's plant, the amount expended in permanent improvements thereto, the amount and market value of its bonds and stocks, etc., are all proper elements to be considered by a local regulatory body in fixing retail rates (*Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 120 N.W. 966, affirmed by this Court in 223 U.S. 655). Therefore, it does not necessarily follow, as assumed by the court below, that a reduction in interstate rates paid by a local distributor to a natural-gas company is *ipso facto* extended to the ultimate consumers by a proportionate reduction of rates paid by them to such distributor. A local regulatory body is required to approve or fix rates in recognition of the right of the local distributor to earn a fair return on its investment as well as the right of ultimate consumers to purchase natural gas at fair and reasonable rates (*Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 120 N.W. 966, affirmed by this Court in 223 U.S. 655).

The decision as to what is a proper rate to be paid by the ultimate consumers is, in the final analysis, a question exclusively in the field of State regulation. If the State authority deems it proper to do so, it may pass on to the ultimate consumers the benefit of all or only a part of any reduction ordered by the Federal Power Commission in the interstate rates paid by the local distributor, or it may decide that under all of the circumstances the consumers are not entitled to any reduction in intrastate rates. In any event, the Federal Power Commission, having discharged its duty by ordering a reduction of interstate rates, is powerless to follow through and order any

change in past or future rates paid or to be paid by the ultimate consumers, since that is a function entirely within the field of State regulation.

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S.498;

Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456;

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591.

Despite the aforesaid limitations on Federal jurisdiction or power, the court below determined that the entire refund made by the Natural Gas Companies belonged and should be awarded directly to the ultimate consumers. This was done on the theory that the proceedings before the Federal Power Commission in which the rate reduction order here involved was entered were solely for the benefit of the ultimate consumers and that the local utilities were merely conduits and trustees for such consumers (R. 62, 63). As a result the court below arrogated to itself the power denied the Federal Power Commission and reserved exclusively for exercise by the States by the express terms of the Natural Gas Act and failed to observe that the ultimate purpose of the Act, namely, benefit to consumers, is intended to be accomplished only within the machinery of the joint system of regulation afforded by both Federal and State legislation and that protection of the public interest under the Act is restricted to public interest in interstate commerce and does not include public interest in local distribution.

The determination of the court below that the total refund belonged to the ultimate consumers violated not only the whole concept of joint regulation, but also involved a retroactive reduction of local retail rates without consideration of any of the factors which a State regulatory body would be required to consider in fixing such

rates prospectively. As indicated above, a local distributor is entitled to have a State regulatory body consider all of the various factors which go to make up its investment and cost of doing business and therefrom fix rates which will permit the local distributor to earn a fair return on its investment. These are not, however, the only questions which a local regulatory body would be required to consider in determining whether an interstate rate reduction effected by the Federal Power Commission should be passed on to ultimate consumers.

The facts in the instant case suggest many additional questions which would have to be resolved by a local regulatory body before an interstate rate reduction is passed on to the ultimate consumers such as whether the benefits should be passed on equally to consumers using natural gas mixed with artificial gas and consumers using only natural gas (the court below disregarded the fact that Central, in connection with certain of its retail sales, mixed natural gas with artificial gas and divided a part of the fund here in dispute according to the number of consumers in each municipality rather than on the basis of the amount of natural gas they had consumed (R. 130, 131)); whether the benefits should be passed on only to home users of natural gas for cooking purposes or also to users of natural gas for home heating and industrial purposes (the court below by its decree of September 3, 1942, found that only consumers using natural gas for cooking purposes were entitled to the benefit of the interstate rate reduction and that industrial users and home heating users were not entitled to any of the benefits (R. 67-70)), etc. Questions such as these would necessarily have to be considered in arriving at a final decision as to whether the ultimate consumers would be entitled to the benefits of an interstate rate reduction and also the answer to these questions, as appears from a mere statement thereof, resides wholly within the province of a State regulatory body. Thus

the finding of the court below that the refund made by the Natural Gas Companies belonged *in toto* to the ultimate consumers was not only a finding not warranted by the evidence but was a direct extension of Federal authority into the field of State regulation and a complete disruption of the whole theory of joint regulation by the Federal and State Governments, each acting exclusively within its sphere.

As indicated above, the Iowa municipalities involved under Section 6143 of the Iowa Code might have fixed a new schedule of local retail rates at any time after the entry of the interstate rate reduction order of the Federal Power Commission. Neither the Federal Power Commission nor the court below could take that action. Nevertheless the court below, apparently on the theory that State regulatory bodies were unable to reduce local retail rates retroactively so that the consumers might share in the benefits of the refund during the period prior to the promulgation of reduced retail rates by the municipalities, sought under the guise of making equitable distribution of the refund to in effect reduce local retail rates retroactively by awarding the refund to the consumers. In other words, the court below attempted to retroactively fix rates to consumers, although without power to do so prospectively.

Central submits that a mere claimed inadequacy of State regulatory machinery or a failure of local officials to use that machinery to adequately protect the consumers in their present claim to retroactive relief is not sufficient to vest the court below with power which it did not otherwise have. The remedy of the local consumers in the instant case was and is applicable to their respective municipalities to fix a new schedule of rates so as to pass on the benefits of the rate reduction order of the Federal Power Commission to the consumers if after consideration of

all rate factors they are entitled to such reduction (*Woodrich v. Northern Pacific Railway Company*, 71 Fed. 2d 732, C.C.A. 8th Cir., and *Frank A. Graham Ice Co. v. Chicago M. & St. P. Ry. Co.*, 140 N.W. 1097, Sup. Ct. of Wis.).

Whether under Iowa law the consumers could enforce a claim against Central by way of reparation is uncertain. Central believes, however, that it is not required in the instant case to speculate upon what the Iowa law in that regard may be. Suffice it to say that a mere claim of failure on the part of State machinery to accomplish equity for the consumers is not a proper basis on which to predicate the exercise of Federal jurisdiction over any part of the field in which State regulatory power is supreme.

IV.

CENTRAL, AS A MATTER OF LEGAL RIGHT, IS ENTITLED TO THE FUND IN DISPUTE.

- A. The Natural Gas Act contains a clear implication that refunds representing excessive rates paid to a natural gas company shall be made to the person who paid such rates.**

The Natural Gas Act does not, by implication or otherwise, declare that the benefit of a rate reduction order of the Commission, or the benefit of a refund made as a consequence of the payment of excessive rates, shall be awarded by the Commission or the Federal courts directly to the ultimate consumers. On the contrary, Section 4 of the Act (15 U.S.C. 717c) contains a strong implication that refunds made as a result of the payment of excessive rates shall be made directly to the person who paid the same.

Section 4(d) of the Act (15 U.S.C. 717c(d)) in general sets forth the method whereby a natural-gas company may make a new schedule of increased rates effective. Section 4(e) (15 U.S.C. 717c(e)) provides, among other things, that " * * * Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, *specifying by whom and in whose behalf such amounts were paid*, and, upon completion of the hearing and decision to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. * * * " (Italics supplied.)

The apparent purpose of the foregoing provision requiring a natural-gas company, under the conditions designated, to keep accounts specifying by whom and in whose behalf such amounts were paid is to provide a record so that refunds may be made to the persons who actually paid the increased rates represented by the new schedule.

Of course, there is no distinction in principle between refunds made as a consequence of the refusal of the Commission to approve a new schedule of increased rates filed by a natural-gas company and a refund made as a result of an improper stay of a rate reduction order of the Commission by a Court of Appeals acting under its general equity powers. In either case the refund should be made to the person entitled thereto according to the intention of Congress as expressed in the Natural Gas Act, and its intention, as indicated herein, is that the refund should be made to the person who actually paid the increased rates to the natural-gas company, which in the instant case was Central.

B. Under the common law, only the person who actually pays excessive rates to a public utility is entitled to reparation therefor.

Central paid the excessive rates to Natural Gas Pipeline Company of America during the period of the erroneous stay by the court below of the rate reduction order of the Federal Power Commission (R. 106) and it was these payments which gave rise to the fund here in dispute (R. 29, 30, 36, 37). Thus Central was the only party in privity of contract with Natural Gas Pipeline Company of America and under the common law rule was the only party entitled to reparation on account of the excessive rates paid by it as a result of the stay.

In *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railroad Company*, 284 U.S. 370, this Court stated the common law rule at page 383 as follows:

"The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, 275, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 S. Ct. 844. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

The reasoning on which the above common law rule is premised is discussed in *Southern Pacific Company v. Darnell-Taenzer Lumber Company*, 245 U.S. 531. In that case this Court held that the right to recover excessive freight rates from a public carrier is vested in the party who paid such rates irrespective of the fact that he has passed on the burden thereof to someone else. While this decision arose under the reparation provisions of the Inter-

state Commerce Act (34 Stat. 590, c. 3591, Sec. 5), the same is pertinent here inasmuch as that Act did not then specify who was entitled to reparation. In arriving at its decision the court stated at pages 533 and 534 as follows:

"* * * The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law, and it does not inquire into later events. *Olds v. Mapes-Reeve Constr. Co.*, 177 Mass. 41, 44, 58 N.E. 478. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer, who in turn paid an increased price. He has no privity with the carrier. *State v. Central Vermont R. Co.*, 81 Vt. 459, 21 L.R.A. (N.S.) 949, 71 Atl. 193. See *Nicola, S. & M. Co. v. Louisville & N. R. Co.*, 14 Inters. Com. Rep. 199, 207-209; *Baker Mfg. Co. v. Chicago & N. W. R. Co.*, 21 Inters. Com. Rep. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, N. H. & H. R. Co. v. Ballou & Wright*, P.U.R. 1918A, 149, 155 C. C. A. 450, 242 Fed. 862. Behind the technical mode of statement is the consideration, well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 Inters. Com. Rep. 680. Probably in the end the public pays the damages in most cases of compensated torts."

It is clear from the foregoing pronouncements of this Court that under the common law rule only the person in privity of contract with the public utility, or in other words the person who paid the excessive rates, is entitled to recover the same from the public utility. Therefore, since Central in the instant case was the person who paid the excessive rates to Natural Gas Pipeline Company of America during the refund period, it is the only one who, as a matter of legal right, is entitled to a refund of these rates.

C. Under the terms of the stay orders entered by the court below and the bonds filed by the Natural Gas Companies to obtain the stay, Central is entitled to the refund.

The orders of the court below staying the rate reduction order of the Federal Power Commission and the bonds filed by the Natural Gas Companies (and approved by the court) to obtain the stay expressly provide that any refunds by the Natural Gas Companies, if made, should be made to the purchasers at wholesale from the Natural Gas Companies (R. 28, 29, 30, 31, 32, 33, 34, 35, 36). Central was, of course, a wholesale purchaser of natural gas from Natural Gas Pipeline Company of America during the refund period, and the aforesaid orders and bonds were particularly designed for its protection as well as the protection of the other purchasers at wholesale.

Notwithstanding the fact that the aforesaid orders and bonds were expressly conditioned for the benefit of Central, the court below nevertheless directed that the refund be made to the ultimate consumers (R. 130, 131). This action is contrary to the decisions of this Court. Thus *In the Matter of Lincoln Gas & Electric Light Co.*, 256 U.S. 512, this Court held that a bond posted with a district court to obtain a stay of utility rates fixed by a municipal

ordinance should on the coming down of a mandate from this Court be enforced according to its terms. In this connection, the Court at pages 516 and 517 said:

"* * * The necessary meaning (of the mandate) is that the court below should proceed to carry our decision into full effect according to right and justice; and, manifestly, this could not be done without proceeding to enforce the supersedeas bond according to its terms. * * * To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the district court under the mandate.

The case is within the principle of *Arkadelphia Mill Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, 143-147, 63 L. ed., 517, 523-525, P.U.R. 1919C, 710, 39 Sup. Ct. Rep. 237."

Since a supersedeas bond under the decisions of this Court is entitled to the same sanctity as a contract made outside the province of a court, and since the bonds in the instant case were expressly conditioned for the benefit of Central, the fund involved should be adjudged to belong to Central as a matter of legal right.

D. Under the decisions of this Court it was the mandatory duty of the court below to adjudicate Central's legal right to the fund in dispute.

The court below in its orders of February 14, 1944, denying Central's petition and directing payment of the fund to the Treasurers of the four municipalities involved, recited not only that the ultimate consumers were the owners of the fund but also that it was desirous of paying the same at the earliest possible date to the parties entitled thereto and "to permit of a determination of said rights by a court or body having jurisdiction thereof" (R. 129, 130). In effect, the court below by these orders, while disclaiming jurisdiction, nevertheless exercised jurisdiction

to award the fund to the ultimate consumers and inconsistently ruled that the award should not be considered as final. As a result, the court below in effect refused to consider the equities of Central's claim to the fund and shifted the responsibility for the determination of these equities to another tribunal.

Central submits that this action of the court below was erroneous because that court was subject to a mandatory duty to exercise its jurisdiction (as limited by the provisions of the Natural Gas Act, by the decision of this Court in *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, and by the decision of the court below in *Natural Gas Pipeline Co. of America v. Federal Power Commission*, 141 Fed. 2d 27) to finally determine that Central was entitled to the fund. The premise for this contention resides in the decision of this Court in *United States v. Morgan*, 307 U.S. 183, wherein it was held that it was the mandatory duty of a Federal court, in exercising ancillary jurisdiction over a fund, to finally adjudge the rights of the claimants thereto. This principle was even followed by the court below in *Natural Gas Pipeline Co. of America v. Federal Power Commission*, 128 Fed. 2d 481.

If the foregoing principle of law as laid down by this Court and the court below is accepted, it follows that it was the mandatory duty of the court below to award the fund to Central upon the basis that it was entitled thereto under the terms of the Natural Gas Act, the applicable common law rule, and the terms of the supersedeas bond filed by the Natural Gas Companies in this cause. Clearly the court below erred in directing payment of the fund to the Treasurers of the four municipalities since this involved fixing retail rates for natural gas retroactively, which constituted interference with the reserved power of the State of Iowa and a usurpation of the legislative function of fixing retail rates vested in the four municipalities by Section 6143 of the Code of Iowa.

CONCLUSION.

For each of the reasons discussed above, Central respectfully submits that the orders of the court below entered on February 14, 1944, and March 28, 1944 (R. 129-131, 146) should be reversed and that this cause should be remanded with directions that an order be entered awarding the fund here in dispute to Central.

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APPENDIX.

NATURAL GAS ACT.

A. Pertinent Sections of The Natural Gas Act (15 U. S. C. 717)

SECTION 1. (15 USC 717) (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 2. (15 USC 717a (3-9)) When used in this act, unless the context otherwise requires—

. . . .

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

. . . .

SEC. 4. (15 USC 717c (a-c)) (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue

preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own

initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that

the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

• • • •

SEC. 5. (15 USC 717d (a-b)) (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no au-

thority to establish a rate governing the transportation or sale of such natural gas.

. . . .

SEC. 13. (15 USC 717l) Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

. . . .

SEC. 15. (15 USC 717n (a)) (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

. . . .

SEC. 17. (15 USC p (a-c)) (a) The Commission may refer any matter arising in the administration of this act to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated

by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reim-

bursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

* * * *

SEC. 19. (15 USC 717r (a-c)) (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commis-

sion shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsec-

tion (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order:

. . . .

B. Pertinent Sections of the Code of Iowa of 1939.
Chapter 312.

**HEATING PLANTS, WATER OR GAS WORKS, AND
 ELECTRIC PLANTS.**

6127 Cities and Towns * * *.

6143 Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light, or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light, or power for other necessary public purposes and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat, and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution, or contract. (C73, §§473, 475; C97, §725; S13, §725; C24, 27, 31, 35, §6143.)

Chapter 329

CITIES UNDER SPECIAL CHARTER.

6788 Heating, water, gas, and electric plants. Sections 6129 and 6134 to 6143, inclusive, and 6134.01 to 6134.11, inclusive, are applicable to cities acting under special charters. (C97, §§722, 952; S13, §§722, 952; C24, 27, 31, 35, §6788; 47GA, ch. 166, §1.)



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY,

Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**REPLY BRIEF FOR CENTRAL STATES
ELECTRIC COMPANY.**

PERRY M. CHADWICK,

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Of Counsel.

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INTRODUCTION.

Although briefs have been filed herein by the City of Muscatine and the Federal Power Commission, this brief is addressed only to the brief of the Commission inasmuch as Respondents' briefs present substantially the same issues.

I.

The Federal Power Commission did not state all of the questions presented and misstated the position taken by petitioner.

The Federal Power Commission, in its brief, failed to state all of the questions presented. The Commission is in error when it states (Commission's brief 2) that the only orders of the Court of Appeals of which review is sought were those entered on February 14, 1944, in which the court awarded the fund representing the excess of gas rates collected from the petitioner, to the local officials on behalf of the ultimate consumers, and in which petitioner's first intervening petition, claiming the fund on the ground of equity, was denied. The fact is that petitioner made it clear in its petition for certiorari and in its brief, that it is also seeking review of the order entered by the court below on March 11, 1944, in which the court denied the claim asserted by petitioner in its supplemental intervening petition. This supplemental petition was not, as stated by the Commission (Commission's brief 10) a mere petition for rehearing. It was the assertion of a new and different claim to the fund by petitioner (after the court below had refused to extend jurisdiction to hear petitioner's original claim based on equitable grounds), in which petitioner claimed the fund on the ground that it was entitled thereto as a matter of legal right, since it was the party who had paid the excessive charges to the natural gas companies, and since the court could not properly exercise equitable jurisdiction to determine the claims of the ultimate consumers inasmuch as that involved a fixing of retail rates by the court.

The questions presented for review are, therefore, not merely, as stated by the Commission, whether the court

below erred in ordering payment of the fund to "local officials on behalf of the ultimate consumers rather than to petitioner, * * * subject to the assertion of petitioner's claim as against the consumers in any tribunal having jurisdiction to determine it" (Commission's brief 2), but also included the questions of whether the court erred in failing to find petitioner was entitled to the fund as a matter of legal right, whether it was the mandatory duty of the court below to exercise its jurisdiction to adjudicate petitioner's legal rights in the fund rather than to relinquish jurisdiction over the fund, and whether the court below was without jurisdiction to award the fund to the ultimate consumers on the basis of equity, when to do so involved a fixing of local rates by the court, which was a legislative and not a judicial function and one exclusively within the power of the State.

II.

The Power Commission's argument that the fund in dispute equitably belongs to the ultimate consumers is unsound and cannot properly be asserted in this proceeding.

One of the grounds on which the Commission in its brief seeks to justify the action of the court below is that the impounded fund equitably belongs to the ultimate consumers. In support of that contention the Commission first refers to certain of the findings contained in the opinions of the court below to the effect that the consumers are equitably entitled to the fund, and the Commission also sets out an extensive argument to that effect based on some of the facts which are alleged in petitioner's first intervening petition.

Such argument is improperly asserted in this proceeding, for the reason that the court below refused to hear

or consider any facts or evidence in support of petitioner's equitable claim to the fund, the court finding that it did not have jurisdiction to entertain such a claim. The Commission, nevertheless, seeks in its brief to create the inference that the court below fully weighed the equities as between the ultimate consumers and petitioner, and had decided them upon hearing in favor of the consumers. In this connection the Commission refers to various findings contained in the opinions of the court below to the effect that the distributing utilities were "merely conduits by which natural gas transported by (Pipeline) was delivered to customers by utilities," that "the price paid" by such distributing utilities was included in the utilities' bills to their consumers, and that since the Commission's proceedings were instituted to reduce the natural gas cost to the distributing utilities "for the benefit of the consumers" the distribution of the fund to such utilities would constitute a "windfall" to them. (R. 62; Commission's brief 6)

While it is true that the court below delivered itself of such expressions of opinion and directed payment of the fund in dispute to the treasurers of the four municipalities on behalf of the ultimate consumers, it is, nevertheless, incontrovertible that no actual trial was had; nor was any consideration given by the court below to the equities alleged by petitioner in support of its claim in its first petition. This clearly appears from the wording of the various orders entered by the court below, wherein it is recited that "it appearing that petitioner bases its prayer for relief on the ground that its gas rates are, and have been inadequate, and the reasonableness of petitioner's rates being a matter beyond the jurisdiction of this Court, * * * It is ordered, adjudged and decreed that the petition of the intervenor, Central States Electric Company, be, and the same is hereby denied * * * without prejudice to its making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa,

or with the consumers of gas furnished by it in said cities" (R. 129). "The above entitled matter coming on to be heard and the parties being unable to stipulate or agree upon the facts or upon the rights of the parties, . . . And it appearing that a part of said refund belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa . . . And the Court being desirous of paying, at the earliest possible date, to such parties as are entitled to the same, and to permit of a determination of said rights by a Court or body having jurisdiction thereof, and deeming itself duly advised in the premises" (R. 130-131), it was therefore ordered that the funds be paid over to the treasurers of the four municipalities. From the foregoing excerpts alone it is clear that the court below did not hear petitioner's equitable claim. Under such circumstances it is highly improper for the Commission to argue in this proceeding as though the court below fully weighed the equities of the respective claimants and extended a full hearing to petitioner on its equitable claim, and improper for the Commission to ask this court to affirm the decree of the court below as though petitioner's equitable claim had been extended a full hearing on the merits and adversely decided.

The chief arguments of the Commission, based on the partial facts which appear in the pleadings, and on which no evidence was taken, as to why the ultimate consumers were equitably entitled to the impounded fund are summarized and disposed of as follows:

The first argument is to the effect that since petitioner was making a profit on its local distribution of natural gas during the refund period, it necessarily follows that the cost of gas at wholesale was passed on in its entirety to the ultimate consumers. In support of its statement that petitioner was making a profit on its local distribution,

the Commission refers to certain figures in the record which indicate that gas was being distributed in the City of Muscatine at a net profit amounting to $1\frac{1}{2}$ per cent in 1941. This profit, however, did not represent the operations of petitioner but of Iowa Electric Company, which conducted the retail business of distributing gas in Muscatine (R. 115A). As a matter of fact, the only figures in the record which are available bearing on the question of petitioner's operations disclose that:

"* * * The average yearly revenue during this period (1932-1941) amounted to \$109,790.32, and the average annual expenses, including taxes, amounted to \$81,567.96, leaving an average balance of \$28,222.36 before proper depreciation and adequate return on investment, averaging \$44,934.24 annually. Thus the average yearly loss has been \$16,711.88." (R. 59)

It is, therefore, apparent from the face of the record that petitioner was not even making a profit and that neither petitioner nor Iowa Electric Company was earning a fair return on its investment during the refund period. In the face of this fact the presumption sought to be indulged in by the Commission that "the rates which Pipeline charged to petitioner were included in their entirety in the rates charged the ultimate customers" (Commission's brief 21) is not a proper one.

The Commission's next argument is that the existing retail rates received by petitioner from its customers must be presumed to have been fair and reasonable during the refund period, from which the Commission argues that had it not been for the entry of the stay order by the court below the consumers would have been entitled immediately to a reduction in local rates "measured by the reduction in rates charged to petitioner" (Commission's brief 21). This contention is based upon a false premise in the first instance, namely, that petitioner's retail rates must be presumed to have been fair and adequate, whereas peti-

tioner's allegations (on which no evidence was heard) were that petitioner was not earning a fair return, and the only evidence in the record is that petitioner was operating at an annual loss (R. 59). In the second place, this presumption of the Commission is based upon the equally false premise that every reduction in the wholesale rate warrants a measurable reduction in the retail rate. Such a presumption ignores the fundamental concept that a utility is entitled to earn not only a profit but a fair return on its investment, and that it is for the local regulatory body to determine whether in any given case a reduction of wholesale rates warrants a measurable reduction in retail rates.

Following up the argument that the entry of the stay order prevented the consumers from procuring an immediate reduction in local rates "measured by the reduction in rates charged to petitioner," the Commission argues that the consumers were deprived of a benefit which, if allowed to be retained by petitioner, would result in a windfall. Since, however, the conclusion of the Commission is based on a faulty premise not supported by facts, the conclusion is unsound. As previously pointed out, there is no evidence in the record warranting the finding that petitioner's retail rates included the excess charges paid by petitioner to the natural gas companies, and no basis for any presumption that such is the fact. The Commission, in order to prove that such a measurable reduction would have been made except for the stay order, states the fact to be that after the wholesale rate reduction finally became operative "just such a retail rate reduction was put into effect." In support of this statement the Commission refers to the fact that the City of Muscatine, by ordinance adopted on February 4, 1943, fixed a reduced schedule of retail rates in that City (R. 113-114). There is nothing in the record to show that the reduction effected by this ordinance is comparable in amount to the wholesale rate reduction

effected by the Commission, and it is impossible without full hearing and an opportunity for petitioner to adduce proof for any determination to be made thereon. In the statement filed by petitioner with the court below on June 29, 1942 (prior to the reduction of the local rates), it was stated "the new rate schedule ordered by the Federal Power Commission affords considerable relief, but does not quite cover adequate return and depreciation, and, of course, does nothing to compensate for past losses sustained." Petitioner is confident that, given the opportunity in a proper jurisdiction, it can establish that the rate reduction effected by the 1943 ordinance just mentioned does not effect a reduction of petitioner's local rates measured by the reduction in the wholesale rates charged to petitioner which was ordered by the Commission.

Petitioner submits that it is clear from the foregoing that the Commission's arguments as to why the equities are with the ultimate consumers are unsound, in that they are not based on fact, that there are not sufficient facts in the record from which a proper determination of the equities could be made, and that in the proceedings in the court below facts which support petitioner's equities were not heard or considered, nor did the court below, in the final analysis, purport to make a finding of the equities upon full hearing. The Commission is, therefore, in the position of asking this Court to act as a trial court and make findings based on an incomplete record.

III.

Payment of the fund to the ultimate consumers as reparations because of excessive local rates constitutes fixing rates by the court below.

Petitioner argued at length in its original brief that the payment of the impounded fund to the ultimate consumers,

which was directed by the court below on the ground that the consumers were equitably entitled to the fund, was necessarily based upon a finding that the local rates paid by the consumers during the refund period were excessive and included the excess rates paid by petitioner to the natural gas companies during that period. Petitioner submits that the awarding of the fund to the consumers on that basis has the effect of reducing the rates paid by the consumers and necessarily constitutes a fixing of local rates by the court below, which is beyond the jurisdiction of a federal court since the matter of local rate regulation is exclusively within the power of the several states.

The Power Commission, in its brief, has sought to avoid this point by maintaining, first, that the distribution of the impounded fund did not amount to prescribing or fixing rates by the court but was in the nature of a reparation proceeding, and, second, that under the authority of *United States v. Morgan*, 307 U. S. 183, the court was under a mandatory duty to distribute the fund to the persons equitably entitled thereto.

The Commission, in support of its first contention cites the case of *Arizona Grocery Company v. Atchison, T. & S. F. R. R.*, 284 U. S. 370. That case, in which it was held by this Court that the Interstate Commerce Commission cannot award reparations with respect to shipments which moved under rates approved or prescribed by it, is clearly distinguishable from the instant case. Although it is true that in the course of its opinion this Court pointed out that the Commission could, under its statutory authority, award reparations in cases where it found that merely legal rates (those promulgated by the carriers but not approved or prescribed by the Commission) were unreasonable and likened that function to a judicial function as distinguished from cases where the Commission was exercising its statutory power to authorize or prescribe lawful rates, the final

decision of this Court was that the Commission had no authority to award reparations as to *lawful* rates. The Power Commission, in pointing out the distinction made by this Court as between the judicial function of awarding reparations and the legislative function of fixing rates, overlooked the fact that under the real ruling in the case neither a court nor a commission with statutory authority to order reparations is empowered to do so as to rates which have been *lawfully* fixed, i.e. by a Commission pursuant to statutory authority.

In the instant case the local rates had been *lawfully* fixed by ordinance of the various municipalities involved, who were the only bodies having authority under the Iowa law to fix rates. No federal court has the power, therefore, to award reparations from those rates, which the Power Commission seems to contend is the nature of the present proceeding. If this Court has refused to permit the Interstate Commerce Commission to award reparations which would have the effect of making a retroactive change in rates previously fixed by it over which it had jurisdiction in the first place, then certainly this Court will not permit the court below to retroactively fix local rates on the ground of awarding reparations when neither that court nor the Power Commission ever had any jurisdiction over such rates.

The instant case falls clearly within the class of cases in which this Court has previously stated that a federal court cannot distribute an impounded fund (representing rates collected while an injunction is in force) in a manner which would be the equivalent of rate-making. In the case of *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264 (heretofore cited by petitioner and attempted to be distinguished by the Power Commission), the gist of the decision of this Court was that where the court below conditioned the issuance of an injunction

against a confiscatory rate upon the company's consent that rates in excess of 50 cents should be distributed to the company's customers, *out of funds previously impounded* representing rates charged to customers ranging from 45 to 60 cents, the "practical effect" of imposing such a condition upon the company was to make it surrender the right to invoke a distinctively state legislative function, to wit, rate-making, and was, therefore, invalid.

In the case of *Newton v. Consolidated Gas Company*, 258 U. S. 165 (previously cited by petitioner and attempted to be distinguished by the Power Commission), this Court held that "it was error to direct ultimate distribution of the impounded fund in accordance with any subsequently approved rate. Rate-making is no function of the courts and should not be attempted either directly or indirectly. After declaring the 80-cent rate confiscatory the court should not have attempted, in effect, to subject the company for an indefinite period to some unknown rate to be proclaimed in the future, upon consideration of conditions then prevailing."

If the instant case be likened to a reparation proceeding, then the test of the jurisdiction of the court below to award reparations as against the local retail rate, which was in force during the refund period, is no different because the court has possession of funds belonging to petitioner, which represent excess charges paid by it to the natural gas companies, than if the case were one wherein the ultimate consumers were seeking to bring an action before that court directly against petitioner for the recovery of local rates paid by the consumers to petitioner. In the latter case the court below has itself already gone on record to the effect that any attempt by it to award such reparations would clearly constitute rate-fixing.

Thus in the case of *Natural Gas Pipeline Company v. Federal Power Commission*, 141 F. (2d) 27, a customer of

the utility company, for himself and on behalf of other customers, petitioned the court below to order the utility to refund a portion of its charges for gas for a certain period of time measured by the reduction in the cost of natural gas which it had purchased from the pipeline company for that period. In dismissing the petition the court below stated:

“What petitioner now asks, is to have this court ascertain that there were excess collections from him and the amount thereof. But the only way that we could do this would be to usurp the functions of the Illinois Commerce Commission by fixing what we consider would have been a reasonable rate for the Peoples Company to charge during the period in question, and the specific class or classes of customers entitled to a refund by reason of the Company's charges in excess thereof. We refuse to do so because this court has no rate-making powers. *Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 48, 25 N.E. 2d 482; *Chicago, Milwaukee & St. Paul R. Co. v. State Utilities Commission*, 268 Ill. 49, 57, 108 N.E. 729; *Mills v. People's Gas Light & Coke Co.*, 327 Ill. 508, 536, 537, 158 N.E. 814.”

“The only distinction between the above decision and the instant case is that in the instant case the court below is in possession of moneys belonging to petitioner although not moneys directly paid by the consumers. The Federal Power Commission contends, however, that the possession of this fund by the court below is sufficient to invest it with jurisdiction to make reparations against the rates paid by the consumers during the refund period. Such action is just as much an exercise of rate-making power by the court as would be the rendering of a judgment against petitioner if petitioner were being sued directly by the consumers in the same court for reparations in respect of the retail rates paid by it during the refund period. The Power Commission bases its whole contention as to jurisdiction on the power of the court below to equitably

distribute the impounded fund, citing in this connection the case of *United States v. Morgan*, 307 U. S. 183. That case, however, did not involve any question of the usurpation of state legislative powers by a federal court. It simply held that the court below should retain the fund there in question until the Secretary of Agriculture had concluded his administrative proceedings. It constitutes no authority to negative the proposition that there are limitations upon the extent to which a federal court may go in disposing of a fund in its possession, which limitations are inherent in the nature of the jurisdiction exercised by a federal court. As stated by this court in *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, at 273:

"District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton v. Consolidated Gas Co.*, *supra*; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 14 S. Ct. 1047, 4 Inters. Com. Rep. 560; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; cf. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740."

Payment of the fund in dispute herein to the ultimate consumers by the court below has the practical effect of rate-making by the court, retroactive to be sure, but nevertheless rate-making.

IV.

The legislative history of the Natural Gas Act clearly shows that the benefits of interstate rate reductions were to flow to the ultimate consumers only through the exercise of powers vested in the local regulatory bodies.

Under sub-point D of point I of the Commission's brief it is asserted that since the Natural Gas Act was passed in the public interest it must follow that the Act vests in the Federal courts unrestricted power to award funds accumulated in their possession as a result of orders temporarily staying rate reduction orders of the Federal Power Commission directly to the ultimate consumers. If this had been the intention of Congress by the Natural Gas Act it certainly could have been expressly covered by the inclusion in the Act of provisions to that effect. No such provisions are contained therein and the attempt of the Commission on page 28 of its brief to construe Section 4(a) of the Act to that end is unjustified to say the least. The Commission certainly must know that the words "in whose behalf" contained in Section 4(a) were intended to cover a circumstance where the relationship of principal and agent exists. Surely not even the Commission intended to assert that the petitioner is merely an agent for its customers in purchasing natural gas at wholesale from a natural gas company. No court has ever announced such a doctrine. Likewise no court, other than the court below, has ever determined that a local distributor of natural gas is merely a "conduit" between a natural gas company and its customers. On the contrary, the courts have recognized by a myriad of cases that a local distributor is entitled to have its rates fixed by the regulatory body having jurisdiction in the premises on such a basis that it will earn not less than a fair return on its investment. This of course involves a consideration of all of the factors involved in rate making and the cost of

natural gas is only one of those factors. Since all public laws are passed in the public interest, certainly this fact alone is insufficient to establish a complete reservoir of power in the Federal courts which is expressly denied by the Constitution.

The Commission also contends under sub-point D of point I of its brief that the legislative history of the Natural Gas Act establishes that Congress intended thereby that the fund here in dispute should be paid directly to the ultimate consumers. As pointed out under sub-point C of point II of the petitioner's brief, the legislative history of the Act does not establish any such thing. On the contrary it definitely indicates a plan of cooperative endeavor between the Federal and State regulatory bodies to the end that each body acting exclusively within its own sphere shall establish reasonable rates, which, of course, is all that is necessary or provided for in the Natural Gas Act for the protection of the ultimate consumers. Indeed the material set forth in Appendix B of the Commission's brief contradicts its contentions in this regard. This is demonstrated by a short excerpt from Appendix B at pages 54 and 55 whereat the following appears:

"The object of this bill is to supply regulation in those cases where the State commission has no power to regulate.

There are, however, some situations defined in the bill to which this regulation does not apply. One is local distribution on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local State commission then has the regulatory power. That same general rule applies to the transportation and sale of gas. So this act does not affect the local distribution of gas. *It affects the local consumer's price only by regulating the price at the city gates.* The facilities for local distribution are not within the power of regulation provided in the bill." (Italics ours.)

In view of the legislative history of the Natural Gas Act, it is obvious that the same was particularly designed to complement and in no manner to interfere with the powers of local regulatory bodies over the retail distribution of natural gas and that the arguments of the Commission to the contrary are without any foundation whatsoever.

At page 31 of its brief the Commission states that in practice almost all distributing utilities have acquiesced in the proposition that a fund, representing excessive wholesale rates, belongs to the consumers and adverts to the fact that most of the local distributors in the instant case disclaimed any interest in the general fund. This statement is unfounded inasmuch as there is nothing in the record to disclose why most of the local distributors involved filed disclaimers. If the Commission is interested in what prompted the filing of the disclaimers, it should consider the Federal Excess Profits Tax.

V.

Petitioner's claim against the fund was foreclosed by the orders below.

The Federal Power Commission argues (Point I, Commission's brief) that since petitioner's first claim is based upon a claim of inadequacy in its retail rates, which is a matter determinable under Iowa law, the court below was justified in relinquishing jurisdiction of the impounded fund for disposition by a state court or body and that such action did not have the result of foreclosing petitioner's claim against the fund. This position of the Commission entirely overlooks three vital points:

- (1) While the orders of the court below purported to be without prejudice to petitioner making claim against said fund in some other "court or body having jurisdiction thereof" (R. 130-131), nevertheless both

orders entered on February 14, 1944, contain findings that the fund belongs to the ultimate consumers;

- (2) The court below, in purporting to relinquish jurisdiction of the fund did not direct its payment to a stake holder or return the fund to the natural gas companies to be held by them subject to the claims of parties interested therein, but directed payment of the fund to the local officials on behalf of the ultimate consumers; and
- (3) The order of the court below entered on March 11, 1944 (R. 146) was a direct denial of the petitioner's claim to the impounded fund as a matter of legal right and contained no reservation that it was entered without prejudice.

From the foregoing it is clear that petitioner's claim against the impounded fund was foreclosed by the orders entered below. If the court below was in fact relinquishing jurisdiction of the fund so as to permit a determination of petitioner's rights therein by some other court or body having jurisdiction over petitioner's rates, then simple justice demanded that the fund be relinquished without the court below having incorporated in its orders of February 14, 1944, its previous ruling and its findings that the fund belongs to the ultimate consumers. Incorporating such findings in an order, purporting to relinquish jurisdiction without deciding the claims of adverse parties to the fund, was highly irregular to say the least and could only have the effect of being prejudicial to petitioner in any further proceedings elsewhere.

While petitioner does not question the right of a Federal court under circumstances such as those existing in the case of *Pennsylvania v. Williams*, 294 U. S. 176, and the other cases cited by the Commission on that point, to relinquish its jurisdiction in favor of state courts, or other bodies or officers, where its exercise concerns a matter which may more properly be settled by a state court, petitioner con-

tends that is not what was done by the court below in the instant case. Such relinquishment of jurisdiction by a Federal court is, as established by the cases mentioned, proper where there is a state court or state body or state officer designated and empowered by state law to administer the funds or other assets and where the procedure provided by the state law is adequate and complete and accomplishes the same end in substantially the same manner as would be reached in the proceedings pending before the Federal court. In other words, relinquishment may be made to a proper stake holder where the rights of claimants to the funds or assets will not be prejudiced by such relinquishment of jurisdiction by the Federal court and where the parties will receive substantial justice by some authority authorized to adjudicate their claims. Certainly a relinquishment of jurisdiction by payment of funds to one of the parties in interest, although accompanied by a declaration that the adverse party might thereafter sue in some other forum to establish his right in the fund held by the other claimant, does not fall within the circumstances under which a Federal court of equity is justified in relinquishing jurisdiction. As mentioned in petitioner's original brief (p. 36), the Iowa municipalities are not granted, by statute, power to make reparation awards or to receive, administer or distribute the fund here in dispute. These municipalities are neither courts, state bodies nor state officials empowered by law to hear and adjudicate the claims of the petitioner or of the ultimate consumers to the impounded fund. That fact, coupled with the findings made by the court below that the fund belongs to the ultimate consumers, makes it obvious that the payment of the fund to the local officials has none of the aspects of a relinquishment by the court below of its jurisdiction to a state court or body having jurisdiction, but was tantamount to delivery of the fund to the ultimate consumers who were parties to the controversy pending before the court below.

Such an act was a clear abuse of discretion by the court below since it constituted actually deciding the case, under the guise of relinquishing jurisdiction to do so.

No extended comment is necessary on the proposition that the denial of petitioner's supplemental petition with prejudice has the effect of foreclosing petitioner's claim.

CONCLUSION.

The instant case may be summarized as one wherein the court below, having impounded a fund consisting of excess charges paid by petitioner to the natural gas companies during the refund period which, as a matter of law, belongs to petitioner, denies petitioner's claim to the fund on the ground of legal right and, under the guise of relinquishing jurisdiction over the fund, directs payment of the fund to the local officials on behalf of the ultimate consumers (the other claimants to the fund) with findings that the fund belongs to such consumers, relegating petitioner to some other forum or body for the enforcement of its rights.

In support of this action on the part of the court below it is argued by the Power Commission and the City of Muscatine that the court below had jurisdiction to hear the equitable claim of the ultimate consumers based on the ground that their retail rates were excessive during the refund period (although the court below denied itself jurisdiction to hear petitioner's claim based on the ground that the retail rates were inadequate) and had equitable jurisdiction to distribute the fund directly to the ultimate consumers, although such determination and disposition amounts in fact to the fixing of local rates by the court below. The Power Commission requests this Court not merely to approve the action taken by the court below, which the Power Commission alleges did not go far enough, but also to sit as a trial court and determine for itself that the equities of the ultimate consumers are superior to those

of petitioner and to do so upon a partial statement of the facts which, so far as those bearing on the matter of petitioner's inadequate rates are concerned, were not presented to or heard by the court below.

Petitioner's contention is that the court below did not in fact relinquish jurisdiction to the state authorities without prejudice to petitioner's rights, but that the action by that court amounted to an actual decision by the court, in the exercise of equitable jurisdiction, to award the fund to the ultimate consumers, in reparation for alleged excessive local rates paid by them during the refund period. Petitioner's position is that the court below did not have jurisdiction to award the fund to the ultimate consumers based on the ground that the rates charged them by petitioner during the refund period were excessive since that constituted a retroactive fixing of such rates by the court and that the court was therefore bound to direct payment of the fund to petitioner as the claimant with a legal right thereto. In other words, the disposition of the impounded fund must be made according to the strict rules of contractual privity since, in order to attempt to distribute the fund on the basis of equitable principles, the court would be required, under the guise of exercising equity jurisdiction, to exercise a legislative power which is vested exclusively in the state. Such an over-extension of equitable jurisdiction is beyond the intent of Congress in the Natural Gas Act for the purpose of providing federal regulation over interstate traffic to supplement local state regulation, and will result in an invasion of state rights.

In view of the foregoing, it is respectfully submitted that the orders of the court below should be reversed and the relief sought by the petitioner herein granted.

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Of Counsel.





No. 1000

In the Supreme Court of the United States

OCTOBER TERM, 1943

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

CITY OF MUSCATINE, IOWA

and

ELMER E. JOHNSON, FOR HIMSELF AND THE USERS
OF NATURAL GAS IN THE CITY OF GREENFIELD,
IOWA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION
IN OPPOSITION



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(I)



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OPINIONS BELOW

The four opinions of the circuit court of appeals are reported as follows: opinion of May 22, 1942 (R. 36-46), 128 F. (2d) 481; opinion of June 26, 1942 (R. 55-56), 129 F. (2d) 515; opinion of June 30, 1942 (R. 60-63), 134 F. (2d) 263; opinion of September 3, 1942 (R. 67-80), 131 F. (2d) 137.

JURISDICTION

The orders of the circuit court of appeals of which review is sought were entered on February 14, 1944 (R. 129-131). The petition for a writ of certiorari was filed on May 13, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pending the review by the court below and by this Court of an order of the Federal Power Commission under the Natural Gas Act, reducing the interstate wholesale rates charged by Natural Gas Pipeline Company and its affiliate, there accumulated in the court below a fund of \$6,377,913, representing the difference between the rates prescribed by the Commission and the therefore existing rates which the Pipeline Company had been permitted to charge under the court's stay of the Commission's order. Following the decision of this Court in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, sustaining the Commission's order, the court below, upon petition of the Pipeline Company, assumed equitable jurisdiction to distribute that fund. The court below, with the concurrence of the distributing companies which had purchased the gas at wholesale from the Pipeline Company, entered orders distributing 99½% of the impounded fund to the ultimate consumers. The re-

maining $\frac{1}{2}$ of 1% of the fund (\$25,708), arising from sales by the Pipeline Company to petitioner, a distributing company in Iowa, was claimed by petitioner as against its ultimate consumers. The court below refused to determine finally the merits of petitioner's claim and directed that the disputed amount be paid to city treasurers, as representatives of the ultimate consumers, without prejudice to the assertion of petitioner's claim in a court or other body "having jurisdiction thereof."

The question presented is whether the court erred in so disposing of the balance of the fund.

STATUTE INVOLVED

The relevant sections of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

On July 23, 1940, the Federal Power Commission issued an order under the Natural Gas Act, directing the Natural Gas Pipeline Company of America and its affiliate, Texoma Natural Gas Company, to reduce their interstate wholesale rates charged for natural gas so as to reflect a reduction of \$3,750,000 per annum in their operating revenues (R. 1-6). Upon petition of the Pipeline Company, the court below on August 30, 1940, issued a temporary stay of the Commission's rate order (R. 32-34), and the Pipeline Company filed a \$1,000,000 bond to pay its "purchasers at wholesale of natural gas" the "amounts repre-

senting the reduction in the gross revenues of Natural Gas Pipeline Company of America which shall have accrued pending judicial review" of the Commission's order (R. 31-32). After the Pipeline Company filed a petition with the court below to review the Commission's order (R. 7-18), the court dissolved the temporary stay on November 1, 1940, and entered a new stay "until the further order of [the circuit] Court" (R. 28-29, 35). On December 3, 1940, the Pipeline Company filed and the court below approved a bond "in all respects the same as * * * the former bond" (R. 29-31), as required by the terms of the stay order.

Upon review, the court below vacated the Commission's rate order, and on March 16, 1942, this Court in turn reversed that judgment and sustained the Commission's order. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575.¹ This Court remanded the cause for further proceedings in the court below, and in the remanded proceedings the Pipeline Company petitioned the court below to take jurisdiction over, and to distribute, a fund later found to total \$6,377,913.52, representing the difference between the rates prescribed by the Commission and the

¹ At that time, this Court ruled that the question of the disposition of the excess charges collected by the Pipeline Company during the stay of the Commission's order was not for the Court's "determination on the present record." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 598.

rates which the Company had been permitted to charge under the stay order pending review.² The court held that it possessed equitable jurisdiction over the impounded fund, ancillary to its original jurisdiction to issue a stay pending review of the Commission's order under Section 19 (c) of the Natural Gas Act (R. 36-46); and that "as a court of equity" it was obliged "to determine to whom and in what amounts the distribution shall be made" (R. 45). By order of June 24, 1942, the court accordingly took "sole and exclusive jurisdiction over the disposition of the funds" payable by the Pipeline Company under the stay order and restrained all claimants from proceeding in any other court (R. 51, 52). Of this fund less than $\frac{1}{2}$ of 1% (\$25,708.54) related to natural gas purchased from the Pipeline Company by petitioner, Central States Electric Company, a natural gas distributing company in Iowa. With respect to the remaining 99 $\frac{1}{2}$ % of the fund, the distributing companies, with one exception, filed statements with the court disclaiming any interest in the refunds and agreeing that they should rightfully be distributed to the ultimate consumers (R. 47-50, 53, 65, 66).³

² The accumulation of this fund began on September 1, 1940, the date of the Commission's rate reduction order, and ceased on March 31, 1942, when the company put into effect the reduced rates prescribed by the Commission (R. 51).

³ A utility serving Nebraska City claimed that the refund of \$23,991.23 derived from its purchases of gas should be paid to it and not to its consumers. This claim was subsequently settled by stipulation, whereunder almost 70% thereof was paid to the consumers (R. 102-104).

Petitioner filed no such disclaimer, but on June 29, 1942, filed a statement with the court below claiming that the portion of the fund relating to its purchases should be paid to it and not to its ultimate consumers (R. 56-59). Petitioner alleged that a refund to individual consumers "would be a retroactive determination" that petitioner and Iowa Electric Company, the ultimate distributor of more than 80% of petitioner's purchases from the Pipeline Company, "have been earning an adequate return" (R. 59). In a memorandum opinion of June 30, 1942 (R. 60-63), the court stated that all refunds belong to the ultimate consumers, for whose benefit the rate proceedings were instituted, the distributing utilities being "merely conduits, by which natural gas transported by [the Pipeline Company] was delivered to customers by utilities" (R. 62).

The Pipeline Company thereupon deposited \$6,377,913.52 in court (R. 64); and on September 3, 1942, after earmarking the \$25,708.54 relating to petitioner's purchases (R. 68, 71), the court below ordered the distribution of the remaining 99½% of the fund among the ultimate consumers (R. 67-80, 82, 100). The \$25,708.54 to which petitioner laid claim was separated on the ground that a "distinct issue" had arisen concerning its distribution (R. 81-82).

On September 1, 1943, pursuant to leave of court (R. 115), petitioner intervened for the pur-

pose of obtaining the \$25,708.54 (R. 105-114), and the Iowa Electric Company at the same time disclaimed any interest therein (R. 111-112). After notification of petitioner's claim was given to its customers in accordance with court order (R. 115-116), the City of Muscatine, Iowa, and Elmer E. Johnson, Mayor of the City of Greenfield, Iowa, filed claims to the disputed fund as representatives of the ultimate consumers in their respective communities (R. 116-121, 122-123, 126-128).

On February 14, 1944, the court entered the two orders of which petitioner now seeks review. The first order referred to the court's prior ruling that refunds "belonged to the consumers of gas supplied by customers" of the Pipeline Company, and recited that petitioner's claim to the \$25,708.54 was based upon the alleged inadequacy of its rates, "a matter beyond the jurisdiction" of that court. That order denied Central's petition "without prejudice to its making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, all of the State of Iowa, or with the consumers of gas furnished by it in said cities" (R. 129). The second order recited that the court was "desirous of paying [the fund], at the earliest possible date, to such parties as are entitled to the same, and to permit of a determination of said rights by a Court or body having jurisdiction thereof," and directed that the \$25,-

708.54 be paid in specified amounts to the city treasurers of each of the four Iowa cities (R. 130-131).⁴ A supplemental petition in the nature of a petition for rehearing (R. 133-139) was denied (R. 146).

ARGUMENT

The petition for certiorari seeks to have this Court review and determine the respective rights of petitioner and of the ultimate consumers of natural gas in Iowa to the \$25,708.54 fund which accumulated during the operation of the stay order. But that question was not finally determined by the orders of February 14, 1944 (R. 129-131), of which review is now sought (see Pet. 12), and is not properly before this Court. While these orders referred to the court's prior ruling that the refund belongs "to the consumers of gas" (R. 129, 130), they were made expressly without prejudice to assertion of petitioner's alleged rights to the fund in an appropriate forum.⁵ To

⁴ The order also provided that the fund should be suspended in the hands of the clerk of the court below if an appeal should be taken (R. 131, 152).

⁵ If the question were deemed to be presented in this case, the Commission would take the position that as between a distributing utility and the ultimate consumers, the fund representing charges in excess of those prescribed by the Commission, accumulating during a stay of the order, should be distributed to the consumers. The "manifest purpose" of the Natural Gas Act is the "protection of the ultimate consumer and not the intermediate utility" *Mississippi River*

this end the orders in effect placed the fund in the hands of stakeholders—responsible city officials—thereby releasing it from the jurisdiction of the court below and from the operation of the restraint against proceedings in other forums and preserving to petitioner an opportunity to test out its claimed rights to the money.⁶ This clearly appears from the orders which deny petitioner's claim to the fund "without prejudice" to its claiming "said moneys in the hands of the City Treasurers of the said cities" (R. 129-130), which suspend payment to the city treasurers pending an appeal to this Court, and which recite the court's desire to have the fund paid "at the earliest possible date, to such parties as are entitled to the same;" and to permit "a determination of said rights by a Court or body having jurisdiction thereof" (R. 130-131). The court's refusal to make a final disposition of pe-

Fuel Corporation v. Federal Power Commission, 121 F. (2d) 159, 164 (C. C. A. 8). See also *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 612.

⁶ The court below, during the course of its disposition and distribution of the \$6,377,913.52 fund, stated on several occasions that "all refunds * * * belong to the consumers, for whose benefit [the rate reduction] proceedings were instituted" (R. 62; see also R. 38, 56). However, virtually all the distributing utilities had agreed that the fund belonged to and should rightfully be distributed to the ultimate consumers (R. 47-50, 53, 65, 66, 102-104). Of the two dissenting utilities, the one in Nebraska City subsequently settled its claim (R. 102-104), and petitioner has been given an opportunity to test its claim in another forum.

petitioner's claim was accompanied by the observation that "the reasonableness of petitioner's rates" was the basis of such claim (see R. 56-59, 106-111) and that such question was beyond its jurisdiction (R. 129). However, it is not necessary to inquire into the court's power in this regard, since its action in declining to adjudicate finally petitioner's rights to the fund and in turning over the refunds to municipal treasurers, in whose hands they would be subject to appropriate local proceedings, was in any event a reasonable exercise of the court's equitable discretion.

1. Petitioner does not question the jurisdiction of the court below to distribute the fund of \$6,377,913.52 created by reason of its stay of the Commission's order (R. 36-46), nor is this open to question. See *United States v. Morgan*, 307 U. S. 183; Natural Gas Act, Section 19 (c). And it is settled that a court when exercising jurisdiction over the custody and distribution of a fund such as here involved acts "as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result." *United States v. Morgan*, 307 U. S. 183, 193-194. It is not improper or uncommon for federal courts of equity, when asked to dispose of or adjudicate "private rights" in property sub-

ject to their control, "to relinquish their jurisdiction in favor of the state courts," where its exercise concerns a matter which may more properly be settled by a state court or pursuant to a state procedure. *Pennsylvania v. Williams*, 294 U. S. 176, 185; cf. *Railroad Commission v. Pullman Co.*, 312 U. S. 496; *Burford v. Sun Oil Co.*, 319 U. S. 315; *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168. In substance, this was the effect of the orders below. The transfer of the refunds to the municipal treasurers made them subject, under the terms of the orders, to appropriate state proceedings. The responsibility of the treasurers as stakeholders has not been questioned.

2. The circumstances of this case and the factual issues posed below make it clear that the court properly exercised its discretion by refusing to adjudicate finally petitioner's rights and by permitting such rights to be determined in appropriate local proceedings.

As the court below observed (R. 129), petitioner's claim was based "on the ground that its gas rates are, and have been inadequate," thus raising the issue of the reasonableness of the rates charged to local consumers. Municipal representatives of ultimate consumers in Iowa denied this contention. The resulting conflict manifestly raised issues with respect to local retail rates determinable under Iowa law. Whether or not the court below had jurisdiction to determine them in

the present proceeding (cf. Sections 1 (b) and 19 (c) of the Natural Gas Act), we think it clear that they could properly be left for consideration and disposition in a state forum.

Moreover, placing the fund with the city treasurers as representatives of the ultimate consumers enables petitioner's right to the fund to be tested in a single suit in the state courts, whereas a payment initially made to petitioner might require a multiplicity of actions by some 3,715 consumers (R. 82) or their representatives to establish their rights thereto.⁷

Since the "exercise of a 'sound discretion, which guides the determination of courts of equity,'" often "calls for a remission of the parties to the state courts, which alone can give a definitive answer to the major questions posed" (*Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168,

⁷ Indeed, outright payment of the fund to petitioner might place it beyond the reach of those who under state law might be entitled to receive it. Even if the Iowa cities concerned herein should, as a result of the Commission's rate-reduction order, fix lower rates for petitioner's sales at retail, consumers may still be deprived of the benefit of that reduction for the period during which the Commission's order was stayed. For the accumulated fund might fall within the category of past profits and hence might not be relevant in fixing future retail rates for the sale of gas. *Knorville v. Knorville Water Co.*, 212 U. S. 1, 14; *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395. To the extent that the prior rates charged by the Pipeline Company were passed on to petitioner's consumers—as presumably all items of costs are passed on—petitioner would receive a windfall as a result of the stay of the Commission's order.

172), the court below clearly did not abuse its discretion by refusing definitively to determine the respective rights of petitioner and the ultimate consumers to a minute fraction (less than $\frac{1}{2}$ of 1%) of a fund already otherwise fully distributed to consumers without objection. No showing has been made that adequate local procedures are not available whereby petitioner's alleged right to the fund can be tested.

CONCLUSION

The action of the court below was clearly correct, and the case does not present any question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Federal Power Commission.

JUNE 1944.

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C., § 717 *et seq.*), are as follows:

SECTION 1. (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue

preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

REHEARINGS: COURT REVIEW OF ORDERS.

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for

any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the

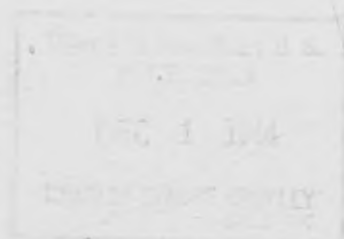
additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.





FILE COPY



No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1944

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

CITY OF MUSCATINE, IOWA, AND ELMER E. JOHNSON, FOR HIMSELF AND THE USERS OF NATURAL GAS IN THE CITY OF GREENFIELD, IOWA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY, PETITIONER
v.

CITY OF MUSCATINE, IOWA, AND ELMER E. JOHNSON,
FOR HIMSELF AND THE USERS OF NATURAL
GAS IN THE CITY OF GREENFIELD, IOWA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The four opinions of the circuit court of appeals are reported as follows: opinion of May 22, 1942 (R. 36-46), 128 F. (2d) 481; opinion of June 26, 1942 (R. 55-56), 129 F. (2d) 515; opinion of June 30, 1942 (R. 60-63), 134 F. (2d) 263; opinion of September 3, 1942 (R. 67-80), 131 F. (2d) 137.

JURISDICTION

The orders of the circuit court of appeals of which review is sought were entered on February

14, 1944 (R. 129-131). The petition for a writ of certiorari was filed on May 13, 1944, and granted on June 12, 1944 (R. 156). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in ordering that a fund representing the excess of gas rates collected during a stay *pendente lite* of a rate order of the Federal Power Commission under the Natural Gas Act should be distributed to municipal officials on behalf of the ultimate consumers rather than to petitioner, the distributing company which had paid the rates directly and passed them on to the consumers, where such distribution was to be subject to the assertion of petitioner's claim against the fund in any other tribunal which may have jurisdiction to determine it.

STATUTE INVOLVED

The relevant portions of the Natural Gas Act of 1938 are set forth in the Appendix A, *infra*, pp. 43-50.

STATEMENT

On July 23, 1940, the Federal Power Commission, on complaint of the Illinois Commerce Commission and after extensive hearings, issued an order under the Natural Gas Act of 1938 finding that the interstate wholesale rates charged by the Natural Gas Pipeline Company and its affiliate,

Texoma Natural Gas Company, for the "resale" of natural gas "for ultimate public consumption", were excessive by at least \$3,750,000 per annum, and directing these companies (hereinafter collectively referred to as "Pipeline") to file new rate schedules reducing such rates accordingly (R. 1-6). Upon petition of Pipeline, the court below on August 30, 1949, issued a temporary stay of the Commission's rate order, the stay to become effective upon the execution and delivery of a \$1,000,000 bond by Pipeline to the clerk of the court below, conditioned upon Pipeline's refunding the "amount represented by the reduction in revenues" caused by the Commission's rate order, to its purchasers "at wholesale, as their several interests appear," if the rate order was ultimately sustained on review (R. 32-34). Pipeline thereupon filed a \$1,000,000 bond in the court below, conditioned upon paying to its "purchasers at wholesale of natural gas" the "amounts representing the reduction in the gross revenues of * * * Pipeline * * * which shall have accrued pending judicial review" of the Commission's order (R. 31-32). Pipeline then filed a petition in the court below to review the Commission's order (R. 7-18).¹

¹ After the petition for review was filed, the court below dissolved its temporary stay order on November 1, 1940, and entered a new stay order "until the further order of [the circuit] court" (R. 28-29, 35), requiring as a condition thereof a bond "in all respects the same as * * * the former bond" (R. 29, 36). On December 3, 1940, Pipeline filed and the court below approved such a bond (R. 29-32).

Upon review, the court below vacated the Commission's rate order (*Natural Gas Pipeline Co. v. Federal Power Commission*, 120 F. (2d) 625). On March 16, 1942, this Court reversed the court below and sustained the Commission's order. *Federal Power Comm'n v. Pipeline Co.*, 315 U. S. 575. At that time, Pipeline contended before this Court that in the event the Commission's rate order was sustained, the fund accumulated as a result of the stay should be retained by Pipeline and should not be turned over to the wholesale distributors, because "the purpose of the rate regulation is the protection of consumers, and * * * will not be effectuated by the refunds to wholesalers" of their "profits from past business" (315 U. S. at 598). Noting that the bond was not in the record, this Court ruled (315 U. S. at 598):

the question of the disposition of the excess charges is not before us for determination on the present record. Cf. *Morgan v. United States*, 304 U. S. 1, 26. Amounts collected in excess of the Commission's order are declared to be unlawful by § 4 (a) of the Act. If there is any basis, either in the bond or the circumstances relied upon by [Pipeline], for not compelling [Pipeline] to surrender these illegal exactions, it does not appear from the record.

This Court remanded the case to the court below for further proceedings in conformity with its opinion. See Mandate, Nos. 265 and 268.

October Term, 1941. Thereupon, in order to restrain suits brought against it by "ultimate consumers" in other forums, Pipeline petitioned the court below to take jurisdiction for "determination and distribution of the amounts payable" by it, representing the difference between the rates prescribed by the Commission and the higher pre-existing rates which Pipeline had been permitted to charge under the stay order (R. 36-37).² On May 22, 1942, upon petition of Pipeline, the court below held (128 F. (2d) 481) that it had possessed equitable jurisdiction to issue a stay pending review of the Commission's rate order under Sections 19 (b) and (c) of the Natural Gas Act (R. 36-46); ruled that "as a court of equity" it had a "mandatory" obligation "to determine to whom and in what amounts the distribution shall be made" (R. 45); and observed that "all parties before the court agree that the excess charges when distributed should in equity be refunded to the ultimate consumers" (R. 39). By order of June 24, 1942, the Court accordingly took "sole and exclusive jurisdiction over the disposition of the funds" payable by Pipeline under the stay order, and enjoined all claimants thereto "from instituting, maintaining or prosecuting any suit,

² The accumulation of this fund began on September 1, 1940, the effective date of the Commission's rate reduction order, and ceased on March 31, 1942, when the companies put into effect the reduced rates prescribed by the Commission (R. 51, 71).

action or proceeding in any other court or jurisdiction" for the recovery thereof (R. 51-52).

In a memorandum opinion of June 30, 1942, the court below ruled that all refunds which Pipeline must make "*belong to the consumers*, for whose benefit" the Commission's rate reduction proceedings were instituted, the distributing utilities being "merely conduits, by which natural gas transported by [Pipeline] was delivered to customers by utilities"; that the "price paid" by such distributing utilities was included in "the utilities' bills to their consumers"; and that since the Commission's proceedings were instituted to reduce the natural gas cost to the distributing utilities "for the benefit of the consumers," the distribution of the fund to such utilities would constitute a "windfall" to them (R. 62). The court also directed an officer of the court to investigate and determine the administrative costs of making a refund, so as to make possible the determination of the net amount of the refund (R. 60-63). 134 F. (2d) 263. Pipeline thereupon deposited \$6,377,913.52 in the court below (R. 64-65).

This fund was made up of charges collected from distributing companies, including petitioner, which purchased gas from Pipeline at wholesale and resold it for ultimate public consumption. All but two of these distributors, which had paid the excessive rates constituting more than 99% of the fund, filed statements with the court below

disclaiming any interest in the refunds, and agreeing that they should rightfully be distributed to the ultimate consumers (R. 47-50, 53, 65, 66). Of the two dissenting distributors, one subsequently settled with its consumers by turning over to them some 70% of the portion of the fund allocable to its purchases (R. 102-104). The balance of the fund except that relating to petitioner's claim was ordered to be distributed to consumers (R. 64, 67-68).³

The sole remaining distributor was petitioner, and on June 29, 1942, it filed a statement with the clerk of the court below claiming that the portion of the fund relating to its purchases (\$25,708.54, or $\frac{1}{10}$ of 1%) should be paid to it and not to its ultimate consumers (R. 56-59). This statement disclosed that petitioner purchased natural gas from Pipeline, but that 80% of the gas received under that contract is taken by the Iowa Electric Company (another distributor) at Pipeline's "contract rates for distribution in the city of Muscatine" and that Iowa Electric "pays the Pipeline Company directly for such gas" (R. 57).

³ The court, at that time, in deciding which classes of natural gas consumers should be eligible for refunds, determined that consumers of natural gas sold for industrial and house heating uses should not receive any portion of the refunds, because the utility rates for these services were established on a basis "which meets competitive conditions in a particular field, rather than on a basis related solely to the costs of providing the particular service" (R. 69). No consumer or any representative of consumers has objected to this ruling.

After alleging that it was not recovering an adequate return on its investment, petitioner contended that a refund to "the individual local consumers" would amount to "a retroactive determination, without a hearing, that [petitioner] and Iowa Electric * * * have been earning an adequate return" (R. 59).

On November 24, 1942, the \$25,708.54 to which petitioner laid claim was separated from the principal fund on the ground that a "distinct issue" has arisen concerning its distribution, which might impair "the distribution of the vastly greater portion [99½%] of the fund" (R. 81-82). On September 1, 1943, pursuant to leave of court (R. 115), petitioner intervened for the purpose of obtaining its alleged share of \$25,708.54 (R. 105-114), and Iowa Electric at the same time disclaimed any interest therein (R. 111-112). Appended to the petition for intervention were statements setting forth (1) that there were no changes in natural gas rates in Muscatine, Iowa, from August, 1936 to February, 1943, and (2) that Iowa Electric had realized returns of 1.7% and 1.5% on its investment in the years 1940 and 1941, respectively. After receiving notification of petitioner's claim in accordance with the court's order (R. 115-116), the City of Muscatine, Iowa, and the Mayor of the City of Greenfield, Iowa, filed claims to the disputed fund as representa-

tives of the ultimate consumers in their respective communities (R. 116-121, 122-123, 126-128).⁴

Following oral argument by counsel for petitioner and the City of Muscatine (R. 126),⁵ the court below on February 14, 1944, entered the two orders of which petitioner now seeks review. The first order referred to the court's prior ruling that refunds "belonged to the consumers of gas supplied by customers" of Pipeline, and recited that petitioner's claim to the \$25,708.54 was based upon the alleged inadequacy of its retail rates, "a matter beyond the jurisdiction" of that court. That order denied the petition "without prejudice to [petitioner's] making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella, * * * or with the consumers of gas furnished by it in said cities" (R. 129). The second order recited that the court was "desirous of paying [the fund], at the earliest possible date, to such parties as are entitled to the same, and

⁴ Sales of natural gas by petitioner were also made to consumers in the Cities of Knoxville and Pella, Iowa. These cities did not intervene or make any claim to the fund, apparently due to the court's failure to give them notice. The sales to consumers in Muscatine made up more than 80% (R. 131) and the sales to consumers in Greenfield made up about 4½% of the portion of the fund in question.

⁵ The Commission did not participate in this argument since it was not served with petitioner's application for leave to intervene (R. 115-116), the response of the City of Muscatine (R. 122), the response of the City of Greenfield (R. 124), or the amended response of Muscatine (R. 128).

to permit of a determination of said rights by a Court or body having jurisdiction thereof", and directed that the \$25,708.54 be paid in specified amounts to the city treasurers of each of the four Iowa cities (R. 130-131).⁶ A supplemental petition, in the nature of a petition for rehearing (R. 133-139) was denied (R. 146).

SUMMARY OF ARGUMENT

I

The court below, in staying *pendente lite* a rate order of the Federal Power Commission directing a reduction in the wholesale natural gas rates of Pipeline, properly impounded, as a condition of its stay, the charges exacted by Pipeline on sales made to distributing companies in excess of those prescribed by the Commission's order. In impounding those charges, the court below assumed the "duty of making disposition of the fund" representing such excess charges "in conformity to equitable principles" (*United States v. Morgan*, 307 U. S. 183, 191), and thereafter distributed, without protest, over 99 per cent of the fund to the distributing companies' customers—the ultimate consumers of the gas. With respect to \$25,708.54 of this fund which petitioner, a local Iowa distributing company, claims is owing

⁶ The order also provided that the fund should be suspended in the hands of the clerk of the court below if an appeal should be taken (R. 131, 152).

to it as against its customers, the ultimate consumers of the gas, the equities likewise indicated distribution to the ultimate consumers.

Inasmuch as petitioner passed the original cost of the gas on to its customers, to allow it to retain the reduction would give it a windfall at their expense. If the Commission's order reducing the wholesale rates paid by petitioner had immediately gone into effect, the local rate regulatory bodies (here the Iowa municipalities) would, at that point, have been free to lower petitioner's retail rates in the light of the Commission's order. Whether or not petitioner, although earning some profit, received a fair return on its investment is immaterial, inasmuch as the Commission's order did not change petitioner's position in this respect in the slightest, and since the way has always been open to petitioner to obtain increased rates upon a proper showing to the local rate-fixing authorities.

Distribution of the impounded fund in accordance with the equitable principles set forth above finds support in the legislative history of the Natural Gas Act, the provisions of the Act itself and in the consistent interpretation given to it by the Commission, the courts, and the other distributing companies occupying the same position as petitioner and having a 99½ percent interest in the funds impounded by the court below. All clearly recognize the established practice that

distributing companies such as petitioner pass on the cost of purchased gas to their ultimate consumers, and that the objective sought by the Act was the protection of these consumers from excessive rates.

Petitioner's argument that the court below had no jurisdiction to distribute the impounded funds to the ultimate consumers, on the ground that such action constituted the fixing of retail rates, disregards the distinction between the legislative function of prescribing future rates and the judicial function of distributing a fund properly impounded under a judicial stay of a rate order. Moreover, the distribution of the fund here involved did not change or affect the retail rates received by petitioner during the stay period; these were still the rates which had been prescribed by the Iowa cities.

While the bond which the court below required Pipeline to file as a condition of its stay provided for the payment of the excess charges by Pipeline to its "purchasers at wholesale," examination of the full terms of the bond in the light of several pronouncements of the court below regarding its provisions clearly shows that its sole purpose was to assure Pipeline's payment of the excess charges into court for distribution to those who were equitably entitled thereto. In addition, petitioner may not defeat the true equities of this case by a literal reading of a bond discharged before it became a

party to the proceeding. Similarly, petitioner's contention that it is entitled to the impounded fund "as a matter of legal right" disregards the fact that equitable principles, and not the strict rules of contractual privity, control the disposition of the impounded fund.

II

The final orders of the court below did not foreclose any right of petitioner to establish its claim to the impounded funds in a state court or other forum having jurisdiction thereof. The distribution thus did not prejudice petitioner's rights, if any, under local law. It is not uncommon for federal courts to relinquish their jurisdiction in favor of local forums, where the questions posed are those with which the latter may more properly deal.

ARGUMENT

The court below several times expressed its views as to the relative rights of the consumers and the distributing companies to the impounded fund. In each instance, the court ruled that the fund belonged to the ultimate consumers, and, with the consent of the distributing companies involved, the court distributed more than 99½ per cent thereof accordingly.⁷ In the two orders here

⁷ In its opinion taking jurisdiction over the impounded fund, representing the excess rates charged by Pipeline, the court below observed that "all parties before [it] agree that the excess charges when distributed should in equity be re-

under review the court referred to its previous rulings that the refund "belongs to the consumers of gas;" recited its desire to have the fund paid "at the earliest possible date, to such parties as are entitled to the same;" and ordered it paid to the treasurers of the four Iowa cities for the benefit of the ultimate consumers "without prejudice" to the petitioner claiming "said moneys in the hands of the City Treasurers" in order to permit "a determination of said rights by a court or body having jurisdiction thereof" (R. 129-131).

While petitioner in its brief (p. 31) treats the decision below as an unqualified holding that the ultimate consumers are entitled to receive the

funded to the ultimate consumers" (R. 39). In a later opinion considering available methods of effectuating the distribution of the impounded fund to the ultimate consumers, the court stated that "*all refunds * * * belong to the consumers, for whose benefit [the rate reduction] proceedings were instituted*" (R. 62). In its decree "determining the ownership" of the impounded fund, the court found "that the moneys, amounting to \$6,377,913.52" belong "to the eligible ultimate consumers of the several utilities involved and should be so distributed; that none of the utilities is entitled to such funds" (R. 67). In its first order of February 14, 1944, here under review, the court referred to its prior ruling that "the refund made by * * * Pipeline * * * belonged to the consumers of gas supplied by customers" of Pipeline and denied petitioner's request that the impounded fund be distributed to it (R. 129). In its second order of that date, the court directed distribution of the \$25,708.54 fund to the treasurers of the four Iowa cities, "it appearing that [the \$25,708.54] belongs to the consumers of gas residing" in those cities (R. 130).

impounded fund, and contends that this decision would be *res judicata* in any further proceeding by petitioner, the orders do not necessarily have that effect. The court did not foreclose the possibility of an independent proceeding by petitioner in another forum, if there be one, having jurisdiction to hear and decide petitioner's contention that it was entitled to the refund because it had not been earning a fair return on its investment—an alleged ground which the court below thought it had no right to pass upon. Consequently, the court's ruling, as we read it, is merely that in its opinion the consumers are entitled to the fund and should receive it from the municipal treasurers, unless petitioner can establish a superior right thereto in another forum.

We shall argue in Point I that the impounded fund belongs in equity to the consumers, and hence the court properly could have ordered distribution of the \$25,708 here involved directly to them. In Point II we shall argue that, in any event, since the final order of the court did not foreclose petitioner from establishing its alleged right to the fund in an appropriate forum, if any, there was no abuse of discretion in ordering the fund paid to the municipal treasurers, as representatives of the ultimate consumers, without prejudice to the assertion by petitioner of a claim thereto in such forum.

I

THE CONSUMERS ARE ENTITLED TO THE IMPOUNDED
FUND.

The Commission's order required a reduction in the rates chargeable by Pipeline to petitioner and other distributors. The stay of this order granted by the court below pending judicial review thereof was to become effective upon execution of a bond by Pipeline guaranteeing refunds of the excess charges to its wholesale purchasers, *i. e.*, to the distributing utilities, if the Commission's order was upheld. The bond given by Pipeline was in fact so conditioned. But the persons beneficially entitled to this refund were petitioner's customers—the consumers of the gas—from whom the excess charges had been collected by petitioner. Consequently, payment of the fund to petitioner would have been payment to a trustee bound in equity to turn it over to the beneficiaries from whom it had been originally obtained. To permit petitioner to retain the impounded funds constituting the excess charges would give it a windfall as a result of a rate reduction order intended for the benefit, not of petitioner, but of its consumers.

A

THE FUND WAS PROPERLY IMPOUNDED

In its brief, petitioner characterizes the stay of the Commission's order as "improper" and "er-

roneous" (Br. 2, 47). Petitioner nowhere explains the basis for ~~this~~^{the} contention, and it is plainly unfounded. The stay was properly granted, and the fund accumulating during the operation of the stay was properly required to be paid into court for distribution to those entitled to it.

The Commission, pursuant to its statutory authority, had found unjust and unreasonable the rates charged by Pipeline for the sale of natural gas in interstate commerce "for resale for ultimate public consumption," and had ordered Pipeline to file new rate schedules reflecting a reduction of \$3,750,000 per annum in operating revenues (R. 1-6). As it was entitled to do under Section 19 (b) of the Act, Pipeline sought judicial review of the rate order and requested the court below to issue a stay of the order pending review (R. 7-28). Such a stay could plainly be granted under Section 19 (c) of the Act,⁸ and petitioner does not contend that the court below abused its discretion in issuing a stay of the Commission's order. Cf. *Scripps Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 10. Since the stay would permit Pipeline to continue to charge its existing rates ~~which~~ had been found unjust and unreasonable, and thus collect charges

⁸ Section 19 (c) provides in part that court review under Section 19 (b) "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

in excess of those prescribed by the Commission, the court below, recognizing its obligation as a court of equity to grant injunctive relief only "upon conditions that will protect all—including the public (*Inland Steel Co. v. United States*, 306 U. S. 153, 157), directed that Pipeline, in order to obtain the stay, agree to surrender the excess charges if the Commission's order was sustained. Since the order was sustained, the funds representing the excess charges collected by Pipeline were properly paid into court. Cf. *United States v. Morgan*, 307 U. S. 183, 194.

B

*
DISTRIBUTION OF THE FUND IS GOVERNED BY EQUITABLE
PRINCIPLES

Having thus properly impounded the funds, the court below clearly has comprehensive authority, as a court of equity, to distribute them fairly. *United States v. Morgan*, 307 U. S. 183; see *Inland Steel Co. v. United States*, 306 U. S. 153.²

In the *Morgan* case, a district court reviewing a rate reduction order issued by the Secretary of

² In both of these cases the courts charged with the duty of disposing of the fund accumulated by virtue of the stay were district courts rather than a circuit court of appeals. However, the pertinency of these decisions to the present case is not thereby diminished, since a circuit court of appeals, when reviewing orders of an administrative agency, acts as a court of original jurisdiction. Cf. *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2).

Agriculture under the Packers and Stockyards Act (42 Stat. 159; 7 U. S. C. §§ 181-229), granted a stay of the rate order and impounded the amounts by which the rates charged during the stay exceeded the rates prescribed by the Secretary. After the Secretary's order had been twice upheld on the merits by a three-judge district court, it was held invalid by this Court for procedural defects (*Morgan v. United States*, 304 U. S. 1), and the case was remanded to the district court for further proceedings. The Secretary reopened the original proceedings in order to correct the procedural errors, and moved the district court to retain the impounded funds. This Court held that the funds should be retained to await the Secretary's rate determination in order that the court might have an "appropriate basis for its action" in making an equitable distribution of the impounded funds (307 U. S., at 198). One of the "cardinal principles" which this Court ruled should be applied in distributing the fund was that a court reviewing a rate order—

* * * sits as a court of equity, * * *
and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, *it assumes the duty of making disposition of the fund in conformity to equitable principles.* (307 U. S., at 190-191.) [Italics supplied.]

In other words, the reviewing court holds the impounded funds, representing excessive rates, "*in custodia legis*," under an "equitable duty to dispose of them according to law and justice" and "free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result." (307 U. S., at 193-194.) And in making distribution, the court has complete jurisdiction to protect all persons—not only the litigants, but also the "public, whose interests the injunction and the final disposition of the fund affect" (307 U. S., at 194).

C

THE EQUITIES OF THE CONSUMERS IN THE IMPOUNDED FUND ARE SUPERIOR TO THOSE OF THE DISTRIBUTORS

Tested by the pertinent criterion—the equitable right to the impounded funds—it seems clear that the claim of the ultimate consumers is superior to that of petitioner. This is demonstrated by comparing the various situations which existed as a result of the Commission's rate reduction order, the stay of the rate order, and the dissolution of the stay.

Before the Commission issued its order of July 23, 1940, directing the reduction in Pipeline's rates, petitioner was buying natural gas from Pipeline and selling it to the ultimate consumers, either directly or through an intervening dis-

tributing company. At this time, the gas involved here was distributed in Muscatine at a net profit (R. 115A), which could only mean that the rates which Pipeline charged to petitioner were included in their entirety in the rates charged the ultimate customers.

The Commission's rate reduction order was issued on July 23, 1940, and required Pipeline to file a new schedule of rates, reflecting the reductions directed by the Commission. If such schedules had then been filed with the Commission and approved by it, the new rates would have immediately gone into effect, and petitioner would have received the lower charges from Pipeline. While petitioner might not *ipso facto* have been required to reduce its charges to its customers as a result of the reduction in wholesale rates, there would have been no obstacle to immediate proceedings by consumers or their municipal representatives to obtain a reduction in their rates measured by the reduction in the rates charged to petitioner. If petitioner's pre-existing retail rates were fair and just—and petitioner concedes that those rates were in effect since 1936 and without any attempt by petitioner to obtain higher rates (R. 110, 112-114)—the reduction in petitioner's operating costs resulting from the reduction in wholesale rates would immediately render petitioner's rates to its consumers excessive unless the decrease in petitioner's operating costs were

passed on to its customers in the form of reduced retail rates. In fact, such a retail rate reduction was put into effect after the wholesale rate reduction finally became operative.¹⁰

When the court below stayed the Commission's rate reduction order, the practical effect for the duration of the stay was the same as though the Commission had not reduced Pipeline's rates. Pipeline continued to charge the existing rates to petitioner; petitioner continued to pass these rates on to its customers; and petitioner continued to make a net profit after July 23, 1940 (R. 115A). While Pipeline was under an obligation to surrender the excess charges if the Commission's order were upheld, the Commission's order during the court's stay did not affect petitioner's operations, charges, or revenues at all. Petitioner continued to charge and collect the same rates

¹⁰ With the dissolution of the stay order below (R. 68), the schedule of reduced rates filed by Pipeline was approved by the Commission on April 23, 1942 (R. 68). Recognizing that the distributing companies' cost of purchased gas for retail distribution in Muscatine, Iowa, had been decreased as a result of the Commission's order, the City of Muscatine passed an ordinance on February 4, 1943, reducing the retail rates to be thereafter observed in that city (R. 113-114), thus formally passing on to the ultimate consumers the benefit of the Commission's rate order which it had previously been precluded from doing by the court's stay of that order. This adequately refutes petitioner's contention that except for the court's stay of the Commission's order, petitioner would have obtained the amount of the ordered reduction in the interstate wholesale rate during the stay period (Br. 13).

which it had been charging for some 7 years. If, as petitioner contends, it had been earning less than a fair return, there was nothing in either the Commission's rate order or in the court's stay order which prevented petitioner from instituting the requisite proceedings to obtain an increased rate. That petitioner actually did pass on to its customers the excessive wholesale rates which it paid Pipeline appears from the figures submitted by petitioner to the lower court, revealing that the gas operations in Muscatine, Iowa, not only returned all expenses, including cost of purchased gas, but in addition rendered a profit in each year during the period from 1933 through 1941 (R. 115A).¹¹

The stay did, however, have a substantial adverse effect upon petitioner's consumers, since it precluded the institution of proceedings by them to obtain a lower rate from petitioner. So long as petitioner was legally required to pay the existing rates to Pipeline, as it was required to do while the Commission's order was stayed, the consumers were unable to establish before the

¹¹ Petitioner submitted no figures for its own operations but instead relied on Iowa Electric Company's figures showing the result of the latter's operations in Muscatine. It must, therefore, be assumed that petitioner was in no worse condition financially than Iowa Electric. More recent information available to petitioner but not submitted would probably have shown even greater profits. See Moody's *Public Utilities* (1944), pp. 848, 1653.

local rate body that they were being overcharged by petitioner. Hence, the effect of the stay order was to deprive the consumers of any right to obtain through local procedures the benefits of the rate reduction order by the Commission, a right which was successfully exercised after the stay was dissolved. Thus, the stay order did not cost petitioner a cent, while it effectively deprived consumers of the ability to obtain substantial reduction in rates during the period of the stay.

When the Commission's rate order was sustained by this Court and the excess charges were paid into the court below by Pipeline, the impounded fund in a sense represented the rate reductions which the Commission had ordered Pipeline to make in its charges to petitioner and the other distributors. But to pay that fund to the distributors would mean refunding to them excess charges for which they had already been reimbursed by their customers.

Besides bestowing a windfall upon petitioner, payment of the refund to it would prevent or render extremely difficult any attempt by consumers who bore the excess charges, and for whose benefit the rate reduction had been ordered, to recoup the excess charges during the stay period.¹²

¹² Since the retail rates charged by petitioner during the period of the stay could scarcely be characterized as illegal, the consumers' claim to the fund in the hands of the distributors would probably depend upon the application of equitable principles which would return the excess charges to those who had sustained them, rather than to those who had

The impounded funds, if paid to petitioner, would doubtless fall in the category of additional past profits (as a retroactive reduction in the cost of gas purchased by petitioner), and hence beyond the reach of consumers, since past profits may not be considered in fixing future rates (*Knorville v. Knorville Water Co.*, 212 U. S. 1, 14; *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395; *Board of Public Utility Commissioners v. New York Tel. Co.*, 271 U. S. 23, 32; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 313).¹³ Indeed, a distribution of impounded funds to a distributing company in the circumstances of this case might place a premium on delays in litigation during review of the rate order; for example, where an affiliation exists between the wholesale company whose rates are reduced and the distributing company, as is frequently the case, or where such companies agree upon the division of the impounded funds accruing during review.

merely collected and passed them on. Distribution under equitable principles can much more effectively be made by a court already having jurisdiction of a specific fund than by a different forum asked to impress an equitable right upon an executed legal transaction.

¹³ Petitioner admits that if it obtains the impounded funds, it is uncertain "Whether under Iowa law the consumers could enforce a claim against [it] by way of reparation" (Br. 45). There is no need in this proceeding to speculate as to the outcome of consumers' reparation actions to recover the funds from petitioner, for the doubt as to success is in itself an equity supporting the decree below.

The inequity of petitioner's claim to the impounded funds is highlighted by the fact that the distributing utilities occupying the same position as the petitioner and having a "conduit" interest constituting $99\frac{1}{2}$ per cent of the fund, filed statements with the court below disclaiming any right to the fund and agreeing that it should be distributed to the ultimate consumers of natural gas (R. 47-50, 53, 65, 66).

D

CONGRESS INTENDED THAT RATE REDUCTIONS SHOULD BENEFIT CONSUMERS

Petitioner contends that it is entitled "as a matter of legal right" to funds impounded by the court below pending review of the Commission's rate order because that order reduced the rates charged by Pipeline to petitioner as a wholesale purchaser of natural gas (Pet. Br. 45-51). This contention disregards the conceded fact (Br. 42) that the Act is intended for the benefit of the ultimate consumers, not of the distributing utility companies. And while the reduction of the rates to distributors contemplates the use of the States' power to fix future intrastate retail rates to consumers, the true objective of the Act requires that an accumulated fund, the result of litigation over the validity of a reduction in wholesale rates and a stay of the rate order, should be distributed to those who would have benefited from the reduc-

tion in the normal course of events, but for the litigation and the concomitant stay. The interest of Congress in the consumer of natural gas, as contrasted with the producer or distributor, can be seen from the face of the Act, as well as from the underlying legislative materials.

The Congressional policy is announced in Section 1 (a) of the Act, which provides that "the business of transporting and selling natural gas *for ultimate distribution to the public* is affected with a public interest, and that Federal regulation * * * thereof * * * is necessary." To carry out this policy Section 1 (b) of the Act vests the Commission with jurisdiction over the "transportation" and "sale in interstate commerce of natural gas for resale *for ultimate public consumption.*" [Italics supplied.]

The Congressional objective of protecting the consuming public is further apparent from the provisions of the Act relating to the Commission's regulation of rates. Rate schedules showing all rates and charges subject to the Commission's jurisdiction must be filed with the Commission by the natural gas company and kept "open in convenient form and place for public inspection" (Sec. 4 (c) and 4 (d)). And when a rate schedule embodying a proposed increase in wholesale rates becomes effective, pending a determination by the Commission of the reasonable-

ness of the increase, the Commission may require the natural-gas company—

* * * to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and *in whose behalf* such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. (Sec. 4 (a).) [Italics supplied.]

If, as petitioner contends (Br. 46), Congress intended that the portion of the wholesale rates found to be unjust and unreasonable should be returned to the distributing utilities rather than the ultimate consumers, the words "in whose behalf" would be meaningless. The only other interpretation of this section of the Act is that Congress recognized the "conduit" status of distributing companies and sought to avoid their obtaining "windfalls" at the expense of the ultimate consumers as a result of the delay which may occur between the filing of a proposed rate increase and the final determination as to its reasonableness. A similar hiatus between the promulgation of a rate reduction and its final effectiveness should certainly not be permitted to result in a windfall to the same conduit.

That excessive wholesale rates mean excessive retail rates, and that reductions in the former are necessary to obtain reasonable retail rates were fully recognized by Congress in passing the Act. Pursuant to Congressional authority (S. Res. 83, 70th Cong., 1st Sess.), the Federal Trade Commission had made a thorough investigation of the natural gas industry which disclosed excessive profits from the sale of natural gas in interstate commerce for resale to ultimate consumers, as well as other abuses with which the State authorities were unable to cope because of constitutional limitations. The investigation culminated in a report to the Senate showing that the interstate wholesale rate is the "principal item of expense to most natural gas distributing companies" and urging Federal regulation of such rates to assure a fair selling price for natural gas distributed to the general public. (Sen. Doc. 92, Part 84-A, 70th Cong., 1st Sess., pp. 474, 612-617.)

As a result, legislation was introduced which became the Natural Gas Act of 1938. Recognizing that the cost of gas purchased by distributing companies is passed on to the ultimate consumers as an operating expense, included in the retail rates, the State authorities urged passage of the Act since the absence of Federal regulation was blocking their efforts to obtain reasonable

rates for the ultimate consumers.¹⁴ There was complete accord among all concerned with the proposed legislation that its objective was the protection of the ultimate consumers. (See excerpts in Appendix B, *infra*, pp. 51-65, from the Federal Trade Commission Report, the Committee hearings, and the Congressional debates.)

This Court has recognized that "the primary aim" of the Act "was to protect consumers against exploitation at the hands of natural gas companies" (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612).¹⁵ See also *Federal Power Comm'n v. Pipeline Co.*, 315 U. S. 575, 583; *Public Utilities Comm. of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 469. The lower federal courts have also announced that the Act's manifest purpose was the "protection of the ultimate consumer and not the interested utility." *Mississippi River Fuel Corp. v. Federal Power*

¹⁴ In fixing local rates, the State commission had to allow, as an operating expense of the distributing company, whatever the latter paid the interstate pipeline company for purchased gas, and the State commission could not question the reasonableness of the claimed operating expense unless the distributing company and the pipeline company were affiliated. *Missouri v. Kansas Gas Co.*, 295 U. S. 298; *Western Distributing Co. v. Commission*, 285 U. S. 119.

¹⁵ Mr. Justice Jackson's separate opinion in that case contains the statement that "the whole reduction" in the natural gas company's revenues "is owing to domestic users" (320 U. S. at 659). This accords with the action of the court below in excluding industrial and home-heating users from the distribution of the fund (R. 62).

Comm., 121 F. (2d) 159, 164 (C. C. A. 8); see also *Alston Coal Co. v. Federal Power Commission*, 137 F. (2d) 740, 741 (C. C. A. 10). And in practice almost all distributing utilities have acquiesced in the proposition that a fund, representing excessive wholesale rates, which in the nature of things were passed on to the consumers in the retail rates, belongs to the consumers. Distributors whose sales accounted for 99½ percent of the fund here involved have acceded to this principle (R. 47-50, 53, 65, 66). See also *Re Memphis Natural Gas Co.*, 52 P. U. R. (N. S.) 535, Federal Power Commission, Sept. 21, 1943, F. P. C. Opinion No. 104.

E

DISTRIBUTION OF THE IMPOUNDED FUND DOES NOT INVOLVE FIXING
LOCAL RATES

Petitioner recognizes that the impounded funds should be distributed "to the person entitled thereto according to the intention of Congress as expressed in the Natural Gas Act" (Br. 46) and admits that "benefit to consumers" is the "ultimate purpose of the Act" (Br. 42). Petitioner also recognizes that the courts have "inherent equity jurisdiction to impose reasonable conditions upon granting a stay and to distribute funds accumulated in their possession, as a result of a stay, to the persons entitled thereto" (Br. 36). Petitioner argues, however, that the court below had no jurisdiction to distribute the impounded

funds to the ultimate consumers because this would involve the fixing of petitioner's rates to consumers during the stay period, which is allegedly a legislative function (Br. 31, 36-39); and that the benefits of the Act "were intended to accrue to the ultimate consumers only as a result of complementary action by State regulatory bodies" (Br. 40).

This contention disregards the basic distinction between the legislative function of prescribing rates for the future and the judicial function of distributing impounded funds representing past excessive rates collected under a stay of a rate order pending review (see *Arizona Grocery Co. v. Atchison, T. & S. F. R. R.*, 284 U. S. 370). Nothing in the decision below affects the local rates which petitioner has charged or may continue to charge to consumers. Such rates have been, at all times, those prescribed by the applicable municipal ordinances in accordance with Iowa law, and neither the Commission nor the court below has undertaken to change such rates. Petitioner has received those rates, and if the distribution to ultimate consumers is upheld, will continue to have them—although it would receive a different and greater sum if its contention is accepted. Certainly in view of the fact that petitioner has received the same retail rate, it can-

not say that the distribution ordered below has changed the rate.¹⁶

Petitioner's assertion that the Iowa municipalities "might have fixed a new schedule of local retail rates at any time after the entry of the interstate rate reduction order" of the Commission (Br. 44) ignores the effect of the stay order upon the Commission's rate order. The Commission's order required Pipeline to file new rate schedules on or before September 1, 1940, which would re-

¹⁶ *Newton v. Consolidated Gas Co.*, 258 U. S. 165, and *Central Kentucky Natural Gas Co. v. R. R. Comm'n.*, 290 U. S. 264, upon which petitioner relies (Br. 38-39), are not in point. The *Newton* case held that the decree of a district court enjoining a rate as confiscatory on condition that the utility should impound the rate collected in excess thereof, could not direct disposition of the impounded fund "in accordance with any subsequently approved rate," because such action would amount to rate making (258 U. S., at 177). In the instance case, the impounded fund would be distributed without fixing past or future rates.

The *Central Kentucky* case involved an order finding a 45-cent rate set by the State Commission to be confiscatory and a 50-cent rate to be reasonable, but the court conditioned the issuance of a permanent injunction against the confiscatory rate upon the company's consent that rates in excess of 50 cents should be distributed to the company's customers. The company declined to consent to that condition, whereupon the district court ordered distribution of the impounded fund to the company's customers. This Court observed that the "practical effect" of denying the company relief from the confiscatory rates unless the company would submit to a new rate "is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts" (290 U. S., at 272).

flect a reduction of \$3,750,000 per annum in the company's operating revenues. In such order, the Commission specifically reserved "the right to reject all or any part of such schedules and in lieu thereof to prescribe the same by further order" (R. 5). Hence, the form or amount of the reduction in Pipeline's rates to the various distributing companies, such as petitioner, could not be known until the new rate schedules were filed by Pipeline and approved by the Commission. The stay order relieved Pipeline of the necessity of filing new rate schedules pending review of the Commission's order, and such schedules were not filed and approved until April 23, 1942 (R. 68), almost two years after the Commission's rate reduction order was issued. Accordingly, the Iowa municipalities were not in a position to obtain a reduction in the local rates during the stay period since they could not know to what extent the rates charged by Pipeline to petitioner would be reduced, if at all. The court imposing the stay and, to that extent, delaying the benefits of the Commission's order to consumers, thus had the concomitant responsibility of protecting their interests through a proper distribution of the impounded funds.

F

THE BOND REQUIRED BY THE COURT BELOW AFFORDS PETITIONER
NO RIGHTS TO THE FUND

In claiming the impounded fund "as a matter of legal right," petitioner urges that the bond

required by the court below was "expressly conditioned for the benefit" of distributors (Br. 49). While it is true that the bond provided for the payment of the excess charges by Pipeline to its "purchasers at wholesale * * *, as their several interests appear," the bond also contained an express acknowledgment that Pipeline was "firmly bound to the Federal Power Commission and the Illinois Commerce Commission in the sum of One Million Dollars" (R. 30), and both Commissions were acting for the benefit of the ultimate consumers throughout this proceeding (R. 63, 67). At an early stage of the proceedings the court below, which had required filing of the bond, construed it as enuring to the benefit of the consumers and not of the distributing utilities.

The court referred to the bond in its opinion as running "in favor of the Federal Power Commission and the Illinois Commerce Commission" (R. 37), and stated that the condition in the bond "for the payment of money" was "a requirement made to protect the interests of all those whom [the] injunction affected" (R. 43). Obviously, the court which entered the order requiring the filing of the bond could interpret or modify its own direction. The only parties with standing to object would have been those bound by the bond—Pipeline and its affiliate—and they did not do so. Consequently, when the bond was thereafter discharged by payment

of the money into court, no one could have relied upon or been misled by a construction of the bond "according to the letter and not according to the substance" (cf. *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 144). Prior to the cancellation of the bond, petitioner was put on notice of its proposed cancellation by a letter from the clerk of the court dated June 11, 1942 (R. 56), but did not seek to intervene in this proceeding until September 1, 1943 (R. 105), some fifteen months after the bond had been cancelled. As intervenor, petitioner had to accept the case as it found it (*United States v. California Canneries*, 279 U. S. 553, 556; *Vinson v. Washington Gas Company*, 321 U. S. 489, 499), and has no right to rely upon the wording of a bond discharged before it became a party. By payment of the excess charges into the custody of the court, Pipeline discharged its liability under the bond, pursuant to the court's order of June 26, 1942 (R. 54-55). Certainly, petitioner cannot defeat the true equities of the ultimate consumers in the impounded funds by a literal reading of provisions in a virtually nominal bond (see R. 37), cancelled long prior to petitioner's intervention in this proceeding.¹⁷

¹⁷ The bond was merely security to insure the payment of the impounded fund. That the bond was not the equivalent of the fund appears from the fact that it amounted to only a million dollars, whereas the amount actually distributed was over six million dollars.

Regardless of the language of the bond, the court below was—

charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and final disposition of the fund affect. (*United States v. Morgan*, 307 U. S., at 193-194.)

To support the contention that it is entitled to the refund "as a matter of legal right", as "the person who paid the excessive rates" to Pipeline during the refund period (Br. 49), petitioner relies upon *Southern Pacific Company v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, which involved the liability of a carrier for reparations (Br. 47-48). The short answer is that this is not a reparation proceeding.

The issue in a reparation proceeding is the liability of a utility to refund or not to refund excessive rates previously collected. As the *Southern Pacific* case makes clear, a carrier in such a proceeding cannot evade the obligation to make re-

fund by asserting that the party seeking reparation may have passed on the excessive charges to someone else. Obviously, if such a defense were available, the carrier could almost always retain the excess charges because shippers pass on freight charges as an economic matter. But in the instant proceeding, the liability of the party which had exacted the excessive rates is no longer in issue, having been decided by this Court in 315 U. S. 575. The excess charges have been paid into court, and the dispute is limited to the proper disposition of the fund in judicial custody. There is no question of releasing Pipeline from its obligation to surrender the overcharges merely because petitioner has passed on those charges to its customers. And since the disposition of the impounded funds is controlled by equitable principles (*United States v. Morgan*, 307 U. S. 183), strict rules of contractual privity should not be permitted to produce a "windfall" to petitioner contrary to the equities of the situation. As the lower court observed, "It would be a gross travesty upon the proceedings" if petitioner were to succeed in its endeavor "to seize the fruits of the litigation brought for the consumers and retain the money for [its] own individual gain" (R. 63).

We submit, in the light of the foregoing, that the court below was correct in ruling that the excessive rates charged by Pipeline "*belong to the consumers, for whose benefit [the Commission's*

rate reduction], proceedings were instituted," and that the distributing utilities are "merely conduits, by which natural gas transported by [Pipeline] was delivered to customers" by distributing utilities (R. 62).

II

PETITIONER'S CLAIM AGAINST THE FUND WAS NOT FORECLOSED BY THE ORDER BELOW

Although we believe that the court below could properly have ordered payment of the impounded funds directly to the ultimate consumers, the orders below in any event do not foreclose the assertion of petitioner's alleged rights to the fund in another forum.

Petitioner's claim to the impounded fund in the court below was based primarily upon the contention that it was receiving less than a reasonable return upon its investment, and hence that it is entitled to retain some or all of the rate reduction to make up the past deficiency (R. 56-59, 106-111). In the first of its two orders of February 14, 1944 (R. 129-131), the court below stated that "the reasonableness of petitioner's rates" was "a matter beyond [its] jurisdiction," and after adverting to its previous ruling that the refund "belonged to the consumers of gas," the court denied petitioner's claim to the refund. In the second order of that date, the court below ordered the refund to be paid to the representatives of the consumers, after once again finding

that the "refund belongs to the consumers of gas residing in" Muscatine, Greenfield, Knoxville and Pella. But both orders were made "without prejudice" to petitioners claiming "said moneys in the hands of the City Treasurers of the said cities" (R. 129-130), or to a "determination of said rights by a Court or body having jurisdiction thereof" (R. 130).

The opportunity thus afforded petitioner to assert its claim to the impounded fund in another forum can hardly be characterized as "meaningless" (Pet. Br. 31) or as an abuse of discretion. As the court below observed (R. 129), petitioner's claim was based "on the ground that its gas rates are, and have been inadequate," thus raising the issue of the reasonableness of the rates charged to local consumers during the stay period. Municipal representatives of ultimate consumers in Iowa denied this contention. The resulting conflict manifestly raised issues with respect to local retail rates determinable under Iowa law. Whether or not the court below had jurisdiction to determine them in the present proceeding (cf. Sections 1 (b) and 19 (c) of the Natural Gas Act), we think it clear that they could properly be left for consideration and disposition in a state forum. For it is not improper or uncommon for federal courts of equity, when asked to dispose of or adjudicate "private rights" in property subject

to their control, "to relinquish their jurisdiction in favor of the state courts," where its exercise concerns a matter which may more properly be settled by a state court or pursuant to a state procedure. *Pennsylvania v. Williams*, 294 U. S. 176, 185; cf. *Railroad Commission v. Pullman Co.*, 312 U. S. 496; *Burford v. Sun Oil Co.*, 319 U. S. 315. The "exercise of a 'sound discretion, which guides the determination of courts of equity,'" often "calls for a remission of the parties to the state courts, which alone can give a definitive answer to the major questions posed." *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 172.

In substance, this was the effect of the orders below. The transfer of the refunds to the municipal treasurers made them subject, under the terms of the orders, to appropriate state proceedings. The responsibility of the treasurers as stakeholders has not been questioned, and no showing has been made that adequate local procedures are not available to test petitioner's alleged right to the fund. Consequently, the court below clearly did not abuse its discretion by refusing definitively to determine the respective rights of petitioner and the ultimate consumers to a minute fraction (less than $\frac{1}{2}$ of 1-per cent) of a fund already otherwise fully distributed to consumers without objection.

CONCLUSION

The judgment below should therefore be affirmed.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX A

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. § 717 *et seq.*) are as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas sub-

ject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice

shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect,

the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES: DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing com-

pany, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * * *

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by

an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was

entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX B

LEGISLATIVE HISTORY OF NATURAL GAS ACT OF 1938

Final report of the Federal Trade Comm. to the Senate, Sen. Doc. 92, Part 84-A, 70th Cong., 1st Sess.

CONCLUSIONS AND RECOMMENDATIONS

At p. 611:

“These, basically, are the problems presented by the natural-gas and natural-gas pipe-line industry. Because of the importance of natural gas as a national resource, the serious extent to which its supply is being depleted through uneconomical consumption and waste, the fact that a great part of the natural gas produced in the United States travels across many State boundaries, the apparent inability of the States unaided to meet the requirements of the situation presented, the serious abuses which have arisen in the industry by reason of the absence of regulation of interstate gas pipe-line companies, and the insistent and well-founded demands of communities, some even located in or near the producing area or reasonably adjacent to existing lines, not loaded to capacity, for the benefits of natural gas for their industries and for the general consuming public, the situation presents a strong claim for such remedial aid on the part of the Federal Government as may lawfully be granted.

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"There are about 7,000,000 consumers of natural gas, the vast majority in number being classed as domestic, commercial, and small industrial consumers, service to whom is of a public-utility character, with the consequent obligation on the part of purveyors to provide an adequate, dependable, and safe service at reasonable rates."

* * * * *

At p. 612:

"The problem of a fair selling price for natural gas when distributed to the general public, if that price is to be determined by a fair return on the investments involved above necessary operating expenses, taxes, and fair allowances for depreciation, etc., is, in very many communities, much concerned with the fair charges for natural gas transported interstate and delivered to intrastate operations for local distribution. State and other local authorities have no power to fix rates for such interstate service. The city gate rates for natural gas, however, are often the critical element in regulation of local rates."

* * * * *

At p. 614:

"Wholesale rates for gas delivered in interstate commerce should be regulated in all cases, as the States are without power to fix them (*Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927)). Security issues and accounts of companies owning and controlling interstate pipe lines should be regulated, because of the intimate relation these matters bear to rates, and the interest which the public has in their effective control. The beginning of opera-

tion and extension of lines in interstate commerce should also be subjected to supervision, as well as the abandonment of operations. Further, there should be control of intercorporate relations, including the sale of the property or stock of an interstate pipe-line company to another corporation of any character.

"Such regulation should be effective but impose no undue restrictions on the industry. It should not invade the realm of management. It should make possible the protection of the public interest in a field surrendered too long to the unrestricted play of economic and other forces and to a few large interests that are already dominant in the field."

CONG. REC'D 75TH CONG. 1ST SESS., VOL. 81, P. 6721
P. 6721:

"Mr. LEA. Mr. Chairman, I yield myself 10 minutes. Mr. Chairman, as stated by the chairman of the Rules Committee, this bill was reported unanimously by the Interstate and Foreign Commerce Committee.

"The statistics of the last 12 years tell an amazing story in reference to the gas industry of the United States. Today we have over 50,000 wells, located in 24 States, furnishing gas to consumers in 35 States. There are about 8,000,000 consumers in these 35 States.

"In 1934, 1,770,000,000,000 cubic feet of gas was produced in this country. For this gas the consumers paid \$394,000,000; of which amount \$260,000,000 was paid for gas transported in interstate commerce.

"Today we have 65,000 miles of gas-main pipe lines in the United States. In 1930, 302,000,000,-

000 cubic feet of gas was transported in interstate commerce. The amount today is the figure I just stated. Today over 41.5 percent of the gas produced in the United States moves in interstate commerce.

"The domestic rates paid by the consumers at the present time is: For domestic use, 74.6 cents per 1,000 cubic feet; for commercial use, 49.6 cents; and for industrial use, 16.9 cents.

"From 1934 to March 1936, the Federal Trade Commission investigated the gas industry for the purpose of recommending legislation to Congress. Thirty-six of the thirty-eight interstate gas companies reporting to the Federal Trade Commission reported a ledger value of these companies of \$1,600,000,000. This is the statistical background that gives the setting for this legislation.

"The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time. This bill would apply to the transportation of natural gas in interstate commerce and to the sale of natural gas in interstate commerce for resale or public consumption.

* * * * *

"The object of this bill is to supply regulation in those cases where the State commission has no power to regulate.

"There are, however, some situations defined in the bill to which this regulation does not apply.

One is local distribution on the principle that where commerce passes in interstate commerce and reaches the point of broken package, the local State commission then has the regulatory power. That same general rule applies to the transportation and sale of gas. So this act does not affect the local distribution of gas. It affects the local consumer's price only by regulating the price at the city gates. The facilities for local distribution are not within the power of regulation provided in the bill."

P. 6722:

"MR. BEVERLY M. VINCENT. Will not the effect of this bill be to limit the competition in any field, or in any State?

"MR. LEA. It will be left to the Federal Power Commission.

"MR. BEVERLY M. VINCENT. And will not this regulation tend to increase the price to consumers?

"MR. LEA. No; it will not. The State commissions have been very strong in supporting this bill; believing it will save millions of dollars to the consumers of the country."

P. 6723:

"MR. WOLVERTON. Mr. Chairman, the purpose of this bill is to provide Federal regulation and control of the interstate transportation and sale of natural gas.

"Over a period of years the need for this type of legislation has become increasingly apparent. The State regulatory bodies have wide and comprehensive jurisdiction to fix rates and otherwise regulate and control the sale of natural gas to

consumers within the State but do not have any jurisdiction in fixing the rate to the distributing company or the municipality when the purchase of the gas is made from an outside source. This comes within the field of interstate commerce and the jurisdiction over such is denied entirely to the State regulatory bodies and lodged completely in the Federal Congress.

"It can be readily seen that the price to be paid by the consumer depends largely upon the price the local distributing company or municipality has been required to pay to the outside producer. Therefore, if the consumer is to be given the benefit of purchasing gas at fair and reasonable rates there must be some regulation of the producing company engaged in the interstate transportation and sale of gas. It is therefore the purpose of this legislation to close the gap now existing between Federal and State regulation and control and confer upon the Federal Power Commission the right, duty, and authority to exercise such regulatory power in fixing a fair and reasonable rate for gas that is a part of interstate commerce. It seeks to give similar power to regulate and control interstate commerce in gas as now exists in State regulatory bodies with respect to transactions entirely within the States.

"The enactment of this legislation is sought by the utility commissioners of the several States, by municipalities and States, and by the consuming public. It is meritorious and of a type that past experience has shown to be necessary in the public interest. There are also provisions within the proposed law that seek to provide some measure of

conserving the great natural-gas fields from unnecessary use and consequent waste."

P. 6723:

"Mr. HALLECK. Competition in this regard has been ineffective, and as a result, even though the prices of the distributing company to the consumers have been kept within reasonable limits, insofar as the activities of the distributing company are concerned, real protection has not been available to the ultimate consumer, because in many instances the transportation company, transporting in interstate commerce, has charged a rate which is higher than is deemed fair and reasonable."

P. 6725:

"Mr. CROSSER. This legislation will protect the public from being charged wholly unreasonable prices for gas. There should be no opposition to this bill. I hope that it will pass unanimously."

Mr. Kenny, p. 6726:

"Mr. KENNY. * * * The pending bill gives to the Federal Power Commission authority to sit as an independent board or with a State board as a joint board to enforce this act and to bring about regulation that will result, I believe, in an improvement of conditions and reduction of rates so that consumers in States using natural gas will have a fair and reasonable rate."

Mr. Poage, p. 6728:

"Mr. POAGE. * * * I think the bill clearly gives the commission the right to give relief to the domestic consumer, and not place the entire burden of paying a fair return on the entire investment on the domestic consumer. * * *"

81 CONG. REC'D, DEBATE IN SENATE ON H. R. 6586

Mr. Brown, p. 9317:

"The interest of the consumer is the interest we are protecting principally."

HEARINGS BEFORE THE COMMITTEE ON INTERSTATE
AND FOREIGN COMMERCE, HOUSE, 75TH CONG.
1ST SESS. ON H. R. 4008

Statement of John E. Benton, Solicitor, National
Association of Railroad and Utilities Com-
missioners, p. 23:

"Our thought is that some latitude can be allowed to the Federal Commission in using, in the public interest, the money which the Congress appropriates for the Federal Commission. It is money appropriated to be used to secure for the people of the United States efficient services at reasonable rates, and if it is used for that purpose it will be expended as Congress intended it to be expended; and no more can be expended than Congress has appropriated. I say that with respect to the words which I have italicized:"

Statement of Harry R. Booth, Acting Counsel
for Ill. Commerce Comm. p. 24, pp. 24-25:

"It is my opinion that if Congress does not confer upon the Federal Power Commission the power promptly to control interstate natural gas wholesale rates, the people of Illinois may be compelled to pay, during the next 10 years, from 20 to 35 million dollars in excessive charges to the Natural Gas Pipe Line Co. of America. It is for

this reason that prompt and vigorous action upon the part of Congress is necessary.

"While I propose to limit my discussion primarily to the reasons why the enactment of H. R. 4608 is necessary and vital to protect the rate payers in Illinois, I should like to comment briefly, first upon some of the broader problems, and then discuss certain amendments which I believe should be incorporated in the bill.

P. 27:

"The largest item of operating expenses of the Peoples Co. arises out of its annual payments for natural gas to the Chicago District Pipeline Co., which now approximate \$13,000,000 per year. In its effort to determine whether the contracts between the Chicago District Pipeline Co. and the Natural Gas Pipeline Co. of America now place an unfair burden upon the consumers of the Peoples Gas Light & Coke Co., the Commission in November cited the Chicago District Pipeline Co. to show cause why its wholesale rates should not be reduced.

Pp. 38-39:

"The Chicago District Co.'s principal operating expense—and I am afraid I did not make this point clear, and I want to just clear that up—the commission in the *Chicago District Pipeline* case is confronted with the fact that its principal operating expense, over 95 percent of its operating expense, is the payments which it makes to the Natural Gas Pipeline Co. of America. It has indicated that it wants to see how much money the Natural Gas Pipeline Co. of America is now making out of the sale of gas to the Chicago Dis-

trict Pipeline Co., so that it can determine whether or not the operating expenses of the Chicago District Pipeline Co. are reasonable. If they are not reasonable, it may then—I do not know what it will do. If its position is sustained, it may then be in a position to reject part of the operating expenses of the Chicago District Pipeline Co. under the *Western Distributing Co.* case and order the Chicago District Pipeline Co. to file a new schedule of rates under which it sells gas to the Peoples Gas Light & Coke Co.; but it does not have the power to determine what the Natural Gas Pipeline Co. of America shall collect from the Chicago District Pipeline Co., and this bill presumably would confer upon the Federal Power Commission such authority.”

P. 41:

“Mr. BOREN. Now, subsection (b) of section 5 of this bill sets up a system whereby the Federal Commission might run the errands for the State commissions, and I would like for you to give me your opinion on that subsection, as to what particular benefit that would be to the general welfare and why the Federal Government should take this additional burden which apparently belongs to the State Commissions?”

“Mr. BOOTH. Well, I think that the provision is a desirable one. I think that our experience indicates that it is quite vital for the State commissions and the Federal Commission which regulates the same subject matter to work together in order that the public may receive the fullest possible protection.

* * * * *

"Mr. BOOTH. Certainly I believe that the States ought to do the job that is constitutionally and legally theirs, and what we would like to have done is to have the Federal Power Commission authorized to take over or given the authority to fix the interstate wholesale rates, so that the ultimate consumer can receive better protection."

P. 46:

"Mr. BOOTH. * * * I appreciate the courtesy you have given me, Mr. Chairman, and I want to again reemphasize the fact that in my judgment the enactment of this law with appropriate amendments is absolutely vital in order that the consuming public of natural gas or mixed natural and artificial gas be fully protected."

Pp. 56-57 (Letter of Slattery, Chairman, Ill. Commission):

"The largest item in the operating expenses of the People's Gas Light & Coke Co. is its payment for natural gas to Chicago District Pipe Line Co. This latter company is controlled by the People's Gas Light & Coke Co. and owns and operates a pipe line extending from some 40 miles away from Chicago to the Chicago city limits. Its operations are, therefore, intrastate. It purchases all of the natural gas which it transports from the National Gas Pipeline Co. of America, which is the interstate company transporting natural gas from Oklahoma to a point 40 miles distant from Chicago.

* * * * *

"If the pending bill is enacted into law, the Federal Power Commission would clearly have the right to examine into the profits of the Natural

Gas Pipeline Co. of America; and if such profits were found to be excessive, to modify the price accordingly. A reduction in price would be reflected directly in a lower cost of gas to the People's Gas Light & Coke Co., and, of course, a corresponding increase in their net operating income. Therefore, any reductions ordered would be a direct element in the determination of reasonable rates for the People's Gas Light & Coke Co. in the city of Chicago."

P. 70:

"Mr. SCHEER. Well, Mr. Halleck, we assume that legislation of this character is designed to correct—I believe we can assume that it is designed to correct abuses that now exist in this industry. It is the very judgment of the local authorities, in the power which they now have over such pipe lines, that they can require them to supply adequate service wholly within the State; and the local authorities can say what is adequate service.

"Mr. HALLECK. Of course I can understand that on the question of lowering rates where there is no competition, the assistance through Government regulation which would affect a revision of the rates downward would probably be helpful to the consumer more than to anyone else."

Statement of Robert D. Garver, Director, Kansas City Gas Co., p. 101 pp. 192-193

"Now if the city gate rate in Detroit is 33 cents, and if it is 40 cents in Kansas City, it would seem that the customers there would get the benefit of it. As I understand this bill the purpose is not to

see that the pipeline makes more money, or the distributor makes more money, but that the consumer is fairly treated and gets a reasonably low rate. As I say, if this statement is true, and the rate to the city gate at Detroit is 33 cents, and the rate to Kansas City is 40 cents, then let us see what the consumer pays.

* * * * *

"Three thousand cubic feet is the average consumption of the small consumer. The consumer, I suppose, is the one you are interested in protecting, and so I say that the statements that have been made in this respect regarding the rates at Detroit and Kansas City are misleading and do not reflect what the consumer pays. * * *"

Hearing on H. R. 11662, Subcommittee on Interstate and Foreign Commerce, House, 74th Cong. 2d Sess., April 1936

P. 25:

"MR. COOPER. While you say we are not going to touch the retail rates, yet with the power you have it may have a very serious effect on the retail rates in the States.

"MR. DEVANE. That is true and presumably it would be a very beneficial effect to the public."

P. 26:

"MR. LEA. * * * The consumption in the State is secured largely through interstate transmission and the cost of the interstate production is, of course, a very material element in determining the price the local people must pay for their gas. So that if complete regulation is necessary, it would involve interstate regulation."

Pp. 34-35:

"Mr. COLE. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydroelectric generating plants?

"Mr. DEVANE. It does not; no. It does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is, of the bill deals with that.

"Mr. COLE. I do not want to disturb the continuity of your presentation, section by section.

"Mr. DEVANE. Well, I will get to that in a few minutes. But section 11 deals with State compacts, not in the sense of prescribing what State compacts should be but simply gives to the Commission authority to investigate and report to the Congress upon the State compacts that are submitted for approval. But the bill itself does not attempt to regulate either the gathering end or the distributing end of the business; I mean the local distribution of gas.

"Mr. COLE. Under the declarations of this bill, this particular industry is a public utility, coming under Federal regulation to try to assure consumers reasonable rates?

"Mr. DEVANE. Yes.

"Mr. COLE. And yet it attempts to do nothing to prevent the outrageous waste of natural gas which is going on every day, and is going on this very minute.

"Mr. DEVANE. It is a very shocking waste.

"Mr. COLE. Why do we attempt to approach this problem in this manner and at the same time

ignore any approach to the elimination of this shocking waste we all know about? We are dealing with consumers, going to assure the consumers reasonable rates, and yet we are going to tolerate this tremendous waste of the very resource which is declared to be a public utility, and in which we are going to assure reasonable rates to consumers. * * * "

A. R. McDonald, member of Wisc. Comm. and National Association of Railroad and Utility Commissioners; appearing as chairman of the standing committee on legislation of the National Association of Railroad and Utility Commissioners

P. 81:

" * * * What the distributing companies pay to the pipe-line companies for their supplies of gas enters into operating expenses. It is thus clear that the price at which the distributing company can be required to sell gas to the public must depend to a large extent upon the price it is obligated to pay the pipe-line company from which it purchases at wholesale."



FILE COPY

Office of the Clerk of the Supreme Court
JUN 9 1943
CHARLES ELMORE OSWELL

In The

SUPREME COURT OF THE UNITED STATES
October Term, A.D. 1943

No. 1000 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MUSCATINE, IOWA

and

ELMER E. JOHNSON, pro se and for users of
natural gas in the Town of Greenfield, Iowa, etal.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS FOR
SEVENTH CIRCUIT.

ELMER E. JOHNSON,
Attorney for ~~Petitioner.~~
Respondent.



In The

SUPREME COURT OF THE UNITED STATES
October Term, A.D. 1943

No.

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MARIETTA, IOWA,

and

ELMER E. JOHNSON, for himself and the users of
natural gas in the Town of Greenfield, Iowa, et al.

OBJECTION TO PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH
CIRCUIT.

To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Comes now Elmer E. Johnson, for himself and as mayor
of the Town of Greenfield, Iowa, for and on behalf of
the users of natural gas in said town, and makes
objection to the petition of Central States Electric
Company for a writ of certiorari asked of this Court.
Objection is made in two parts.

I.

That the fundamental part of this cause was decided by the United States Circuit Court of Appeals in its decree of September 3, 1942, of which cause the Central States Electric Company had notice and were a party. That this action ought not now be reviewed by your Court in this manner, for the reason that it is or ought to be barred by the Statute of Limitations.

II.

Subject to part I. above, resistance is made to the merits of the petition for a writ of certiorari filed by Central States Electric Company.

A. Respondent denies that Central States Electric Company, hereinafter called "Central", is entitled to the \$25,708.54 fund involved as a matter of legal right, for Central did not pay excessive rates, but same were paid by the ultimate consumers of the gas sold by Central, and the Court has found the above amount to be the amount of over payment. Central just passed the charge on to the consumer. The lower Court has simply provided a method of recovery for the consumer, and I can not see where this conflicts with the authority cited by petitioner.

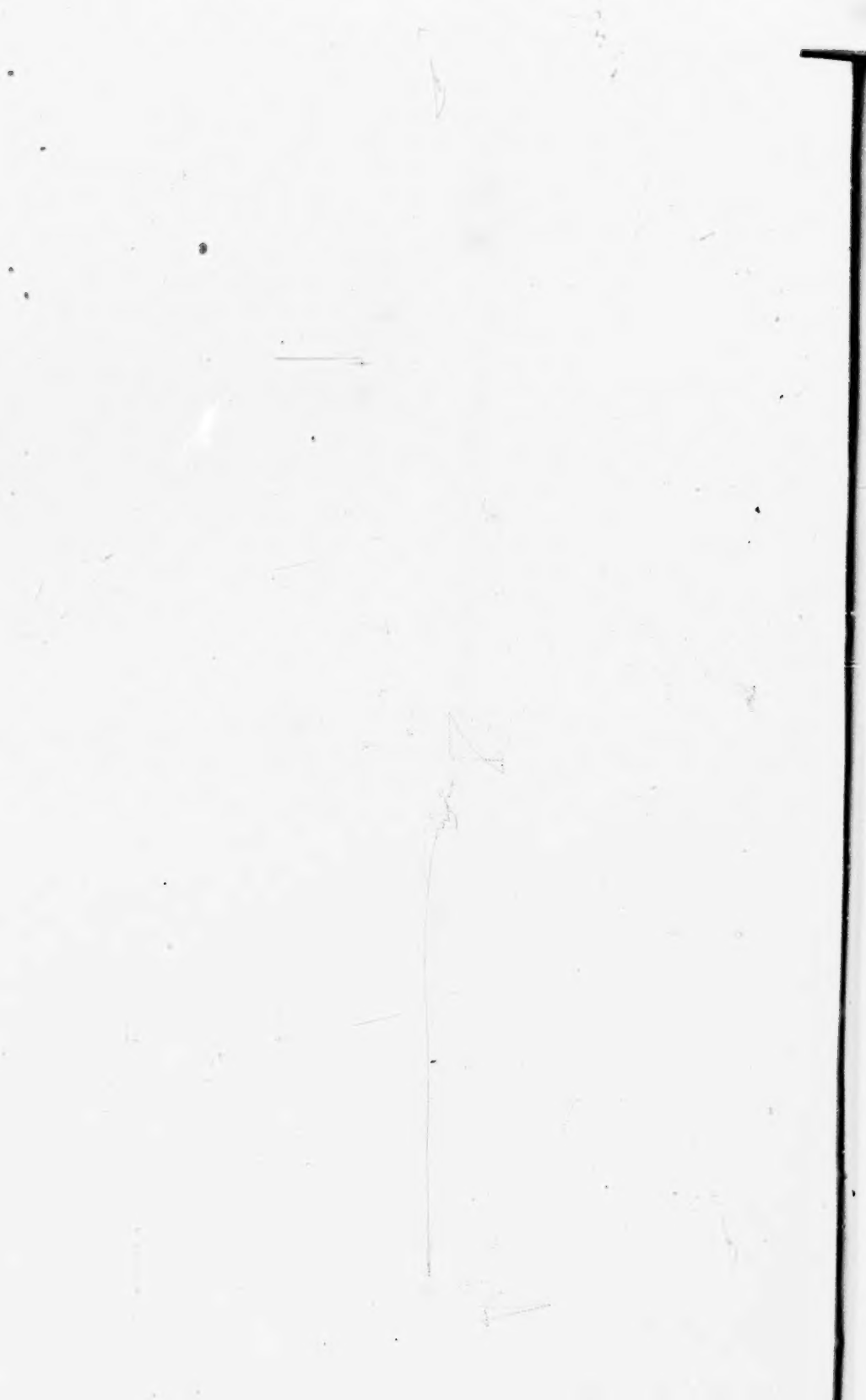
B. I can not see where the Court of Appeals is attempting or has attempted to regulate the contractual relations between the local distributors and the ultimate consumers. It has simply said that the Natural Gas Pipeline Company of America, et al, has overcharged, for gas, and that the user of this gas is entitled to it. It has also provided a manner within the reach of the user to file his claim with his town for his money back. I can not see where this concerns Central. It appears to be fully within the provision of Section One of the Natural Gas Act as set out in the appendix of petitioners petition.

C. The Court of appeals has done and is doing all it can to get this money paid to those rightfully entitled to it, and Central having no equities in this fund ought not worry about how the Court disposes of it. So far Central has made no offer to take the fund and pay it out to the consumer. This town of Greenfield, Iowa is willing to try to do with the part of said fund due its consumers.

D. Respondent further urges in resistance all the grounds heretofore urged in his resistances filed with the Court of Appeals, which by reference are made part hereof.

Wherefore, he respectfully prays that Central's petition be dismissed.

Elmer E. Johnson,
Attorney pro se and for users
of Natural Gas in Town of
Greenfield, Iowa.
Respondent.



FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. **1000** 85

CENTRAL STATES ELECTRIC COMPANY,

Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

Respondent,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.

**BRIEF OF RESPONDENT, CITY OF MUS-
CATINE, IOWA, IN RESISTANCE TO PE-
TITION FOR WRIT OF CERTIORARI OF
CENTRAL STATES ELECTRIC COMPANY**

MATTHEW WESTRATE,

Attorney for Petitioner.



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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, A. D. 1943

No.

CENTRAL STATES ELECTRIC COMPANY,

Petitioner,

vs.

CITY OF MUSCATINE, IOWA,

Respondent,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.

**BRIEF OF RESPONDENT, CITY OF MUS-
CATINE, IOWA, IN RESISTANCE TO PE-
TITION FOR WRIT OF CERTIORARI OF
CENTRAL STATES ELECTRIC COMPANY**

STATEMENT OF CASE.

While admitting, in general, the correctness of the chronological summary of the facts and record as set forth in the first division of the Petition for a Writ of Certiorari, this Respondent respectfully calls the attention of the Court to certain statements in said summary which it believes to be erroneous, and which have a material bearing upon the position of Petitioner before this Court.

In the last paragraph on page 7 of the Petition it is stated that "on September 1, 1943, Central **for the first time** became a party to the proceedings by filing its original petition (R. 106) with the Court of Appeals and it was then granted leave to intervene (R. 115)." Elsewhere in the "Summary" the assertion is made, either directly or by inference, that Petitioner was not a party to the original proceeding. Respondent does not so understand the record.

The petition of intervention and amendments thereto filed by Central States Electric Company on September 1, 1943, was ancillary to the proceeding initiated by the Natural Gas Companies in the Court of Appeals for a review of the order of the Federal Power Commission directing them to reduce their rates to the distributing utilities who purchased their gas. Central States Electric Company was one of such distributors, and was as much a party to the proceedings had in the Court of Appeals as any of the other distributing utilities named in the opinion, orders and decree of the Court of Appeals entered on May 22, 1942, (R. 36-46), June 24, 1942, (R. 51-52) and September 3, 1942, (R. 67-80). In the order entered on June 24, 1942, (R. 51-52), the Court expressly reserved sole and exclusive jurisdiction over the disposition of the funds represented by the excess charges collected by the Natural Gas Companies, and in the "Findings of Fact and Conclusions of Law and Decree" filed September 3, 1942, the Petitioner, Central States Electric Company, is listed among the distributing utilities whose customers were entitled to refunds. (R. 68). If the Petitioner was not a party to these proceedings, it is difficult to understand why the Clerk of the Court of Appeals should address an inquiry to it on June 11, 1942, with respect to the fund in the possession of the Court, and why the Petitioner should have made such an elaborate reply to the Clerk's inquiry. (R. 56-59).

Actually, the Petitioner did not by its petition of intervention filed September 1, 1943, become a new party to the

proceedings, but merely asserted a claim to the fund as against its customers to whom the same had been allocated by the decree of the Court, approximately a year after the filing of the decree and more than fourteen months after the filing of its letter to the Clerk on June 30, 1942, in which it asserted the same claim.

SUMMARY OF ARGUMENT.

1. The Petition for a writ of certiorari presents no questions of law or fact and raises no issues which require a review by this Court of the proceedings had in the Circuit Court of Appeals.

2. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers resided; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.

3. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of the ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.

4. The Court of Appeals has fully exercised its jurisdiction over the fund in dispute.

5. The Petitioner has no right or interest, either legal or equitable, in the fund in question.

6. The City of Muscatine, Iowa, may lawfully administer

the fund directed to be paid to its Treasurer by the Order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of the Petitioner.

ARGUMENT.

1. The Petition for a writ of certiorari presents no questions of law or fact and raises no issues which require a review by this Court of the proceedings had in the Circuit Court of Appeals.

It is a well settled rule of this Court that while jurisdiction to review judgments or decrees of the circuit court of appeals by the extraordinary writ of certiorari under the statute is a jurisdiction to be exercised entirely in the discretion of the Court, it will be exercised sparingly, and only in cases of peculiar gravity and general importance. This Court said, in *Forsythe v. Hammond*, 166 U. S. 506:

"This court, while not doubting its power, has been chary of action in respect to certioraries. * * * Only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation, demand such exercise" of the power to issue certiorari, will the writ be issued.

None of the grounds urged by Petitioner for the issuance of the writ is sufficient to warrant the exercise of its power to do so by this Court. Petitioner concedes that the Court of Appeals had jurisdiction of the fund in question, and complains only that it declined to award the same to it instead of to the ultimate consumers. Its claim upon the fund as set forth in its petition of intervention and the amendments thereto, is based upon allegations which might with equal cogency have been urged by all of the distributing utilities who disclaimed any interest in the funds

which came into the hands of the court. There is nothing in the allegations of the petition of intervention filed in the Court of Appeals, nor in the petition for writ of certiorari, which distinguishes the position of the Petitioner from that of the other utilities who purchased gas from the Natural Gas Companies, and the Court of Appeals properly denied the intervention and thereafter made an order with respect to the disposition of the fund which was entirely within its jurisdiction and consistent with all other proceedings had in the litigation, including the decision of this Court. Certainly no matter of general importance, or one which affects the interest of the nation, is involved here, and we respectfully submit that the petition should be denied.

2. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers resided; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.

We do not understand that the Petitioner is now challenging the jurisdiction of the Court of Appeals to deal completely with the fund which came into its hands as the result of excess charges collected by the Natural Gas Companies during the period covered by the stay orders and until the decision of this Court was filed, but is complaining only of the manner in which that jurisdiction has been exercised, insofar as the particular fund under consideration is concerned. In that connection Petitioner asserts, in effect, that the Court of Appeals by its orders of February 14, 1944, undertook to determine without supporting evidence that the burden of excessive rates paid by the local distributors involved was actually borne by the ultimate

consumers of the gas, and that such orders amounted to a regulation of the contractual relationship between such local distributors and their customers. It seems to us this is a misinterpretation of the orders and the effect thereof, when viewed in the light of the whole record.

In its Opinion filed May 22, 1942, (R. 36-46), the Court of Appeals declared that "responsibility for proper disposition of all excess charges is, under the original jurisdiction of this court and its ancillary powers as a court of equity, mandatory upon us; it is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made". (R. 45). Thereafter and on June 30, 1942, the Court filed a "Memorandum on Methods of Making Refunds to Customers of the Peoples Gas Light and Coke Company," (R. 50-63) in which reference is made to the fund now claimed by Petitioner, and it there stated its holding that all refunds which petitioners (Natural Gas Companies) must make, belong to the consumers. In that connection the Court said:

"Associated with this problem of costs, one utility serving Nebraska City asks that the refund go to it and not to its customers. That it and others may know and plan accordingly, we express our conclusion, and our holding, which is **all refunds which petitioners must make, belong to the consumers**, for whose benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities. The price paid by the utilities was fixed by contract. It, together with cost of services and interest, etc., was what made up the utilities bill to their consumers. * * * The proceedings which were instituted by Federal Power Commission and furthered by the Illinois Commerce Commission to reduce the natural gas cost to the utilities were for the benefit of the consumers. They so declare. Most

of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them. An exception is the Nebraska City utility, which believes it is the beneficiary of a windfall, to which it intends to hold on, if once it can get possession of it. It entertains the old and out-moded conception of utility magnates and utility counsel which overlooked the trustee status of a public utility, whose excuse for existence is service to the public to whom it owes the duty to diligently endeavor to render ever better service at lower rates, as well as to earn a fair return on the capital invested in it. In fact it was the position of counsel for the Pipeline Company in the U. S. Supreme Court that under no circumstances could the utility claim any refund and that if anyone was entitled to the refund, it would be the consumers."

And in dealing with the contention of Petitioner that a refund to the consumers constitutes an interference by the Court with the contractual relationship existing between a local distributor of natural gas and the ultimate consumers of such gas, the Court further said (R. 63):

"A public utility located in Nebraska City and another located in Iowa held contracts with petitioners. As between the two contracting parties, their contract would be binding, but the business of the petitioners was subject to regulation by the Federal Power Commission and also in part by the Illinois Commerce Commission. These two bodies sought to reduce charges to the consumers. As between petitioners and utilities they were not interested, but these boards were interested in reducing charges to the consumers. For the consumers the Federal Power Commission acted. Petitioners so understood the nature of the contract and defended on the ground that they had no contract with these consumers and owed nothing to them as consumers, — nor were they subject to Federal regulation for the consumer's benefit. Nebraska City and all other utilities stood by and accepted the situation as it was tendered by the

pleadings and the parties. Now one or two of these utilities located where no state supervisory commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome if they were to succeed. With their efforts in this respect, we have no sympathy. The court will make an order on this finding that the money refunded by petitioners belongs to the consumers and none belongs to the utility or utilities."

It seems to us that the quoted language clearly states the respective positions of the utilities and the consumers with respect to the fund in dispute, and needs no further elaboration.

3. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of the ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.

It is argued by Petitioner that while Section 1 (b) of the Natural Gas Act declares that the business of transporting and selling natural gas in interstate commerce for ultimate distribution to the public is affected with a public interest, yet the Act contains no provisions indicating that rates charged by natural gas companies in excess of rates fixed by the Federal Power Commission shall be refunded to the ultimate consumers, and then cites a portion of Section 4 (e) of the Act in support of its contention that the fund should be paid to the utilities. We do not believe this construction of the statute is valid.

If the contention of Petitioner is correct, the Natural Gas Act would become a nullity so far as the public interest is concerned, since the benefit of any rate reduction ordered by

the Federal Power Commission and which became the subject of litigation would never reach the ultimate consumer until **after** the validity of such order had been finally adjudicated in the courts, and in the interim the excess charges collected by the natural gas companies would accumulate for the enrichment of the distributing utilities, such as Petitioner, notwithstanding the fact that they were at the same time collecting such excess charges from their customers, under rate schedules in effect before the reduction was ordered by the Power Commission. True, Section 4(e) of the Natural Gas Act does require the natural gas companies, in the event that they increase their rates, "to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision, to order such natural gas companies to refund, with interest, the portion of such increased rates or charges by its decision not found justified." This is by no means the same thing as a refund of excess charges which the Power Commission has ordered to be reduced, as in this case, and which excess charges are incorporated in existing rate schedules and thereby passed on to the consumers. With the exception of the Petitioner and the Nebraska City utility, all of the distributors who purchased gas from the Natural Gas Companies recognized the justice of the proposition that this fund should be returned to the ultimate consumers, and the contention of Petitioner that its rate schedules in the City of Muscatine were not subject to the control or supervision of a state commission, but were established by it to meet competition, in no way alters or affects the fact that it did, during the refund period, collect from its customers in Muscatine for gas used by them upon the basis of a rate schedule adopted, freely and voluntarily and by agreement with the City Council of the City, while the excess charges were being collected by the Natural Gas Companies, and which rate schedule was unquestionably based upon the price paid by Petitioner to

the Natural Gas Pipeline Company for the gas it sold to Muscatine consumers.

It would be strange indeed if the action of the Power Commission in reducing the rates of the Natural Gas Companies to the distributing utilities could enure to the benefit of the consumers living in states which have supervisory commissions, but such benefit would be denied to those members of the gas using public who resided in states which do not have such commissions. The Court of Appeals rightly refused to place such an absurd construction upon the Natural Gas Act in its denial of the petition of intervention filed by Central States Electric Company.

4. The Court of Appeals has fully exercised its jurisdiction over the fund in dispute.

In Division C of its argument, on page 22 of the brief, petitioner avers that "it was the mandatory duty of the Court of Appeals to retain jurisdiction of and determine who was equitably entitled to the fund here in dispute."

We respectfully submit that the Court did just that, in its order of February 14, 1944. That order expressly finds that a part of said refund, in the proportions later set out, belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa, the total amount being \$25,708.54, and then directs the payment of specific portions of such total to the Treasurers of the various municipalities, the amount to be paid by the Clerk of the Court to the City Treasurer of the City of Muscatine being the sum of \$20,823.00. The fact that the order recites that the petition of intervention filed by the Petitioner has been denied without prejudice to said Central States Electric Company's making a claim for said moneys in the hands of the City Treasurers, does not in any way alter the fact that the Court has placed the funds in the hands of the respective Treasurers for the use

of the consumers, to be distributed to such consumers in the same manner as the balance of the refund coming into the hands of the Court.

5. The Petitioner has no right or interest, either legal or equitable, in the fund in question.

We have already discussed this proposition to some extent under nos. 2 and 3 of this argument. Petitioner claims that it has a legal right to the fund because it paid the excess charges in the first instance to the Natural Gas Company. However, those charges were reflected in its rate schedules in effect in the City of Muscatine during the period covered by the refund, and its customers there paid for gas upon the basis of the rates paid by it to the Natural Gas Company. Notwithstanding the fact that Iowa has no supervisory utility commission, it will not be denied that the gas rate schedules adopted by the City Council of the City of Muscatine were the result of negotiation between the Council, acting for the citizens of Muscatine, and the utility, and were not arbitrarily forced upon the utility by the Council. Petitioner averred, in its petition of intervention, that the rate schedule adopted in Muscatine was voluntarily reduced by it at various dates between August, 1936, and February 4, 1943. Such action is hardly consistent with its claim that the rates in effect in Muscatine were inadequate to furnish a proper return upon the capital invested. In this connection, it should be noted that there is no evidence in the record that Petitioner ever invoked the aid of the Power Commission to secure a reduction in the rates it was paying the Natural Gas Pipeline Company, nor did it ever take any other action in that direction. It was a party to the original proceeding, however, in the same manner as the other distributors who purchased gas from the Natural Gas Companies were parties thereto; it addressed a letter to the Clerk of the Court of Appeals setting forth its claim to the fund, in June, 1942, but thereafter did nothing further to present its claim to the Court

until fourteen months later, on September 1, 1943, when it filed its petition of intervention.

Petitioner says that it is the only party in privity of contract with the Natural Gas Companies, and for that reason is the legal owner of the refund. In the case of **Ex parte Lincoln Gas & Electric Co. 256 U. S. 512**, in which a bond had been filed conditioned for payment of the excess rate, and the city and its officials were representatives of the consumers, this Court said:

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection."

Substantially the same situation exists in this proceeding, and the Court of Appeals correctly refused to adopt Petitioner's theory of the ownership of the fund.

6. **The City of Muscatine, Iowa, may lawfully administer the fund directed to be paid to its Treasurer by the Order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of Petitioner.**

Some question is raised by Petitioner as to the authority of the City of Muscatine, Iowa, through its Treasurer, to take the fund as directed by the order of the Court entered February 14, 1944. Upon this point we deem it sufficient to

ay that under the statutes of Iowa, and particularly Section 6143 set out in the Appendix to Petitioner's Brief, cities and towns, including cities under special charter, such as Muscatine, have power to act for and represent their citizens in the regulation of rates and service of public utilities of all kinds, and to adopt ordinances fixing such rates. If they may act for their citizens in such matters, no good reason suggests itself why they should not be competent to act for their citizens when, as customers of a utility, they become entitled to a refund from such utility, and where the number of such customers is large and the amount of their individual interest in the refund is small.

It is respectfully submitted by this respondent that the petition for a writ of certiorari filed by Central States Electric Company should be denied.

MATTHEW WESTRATE,

*Attorney for Respondent
City of Muscatine, Iowa.*



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 85

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

VS.

CITY OF MUSCATINE, IOWA,

and

ELMER E. JOHNSON, for himself and the users
of natural gas in the City of Greenfield, Iowa, et al.
Respondents.

BRIEF FOR CITY OF MUSCATINE, IOWA.

MATTHEW WESTRATE,

*Attorney for Respondent,
City of Muscatine, Iowa.*



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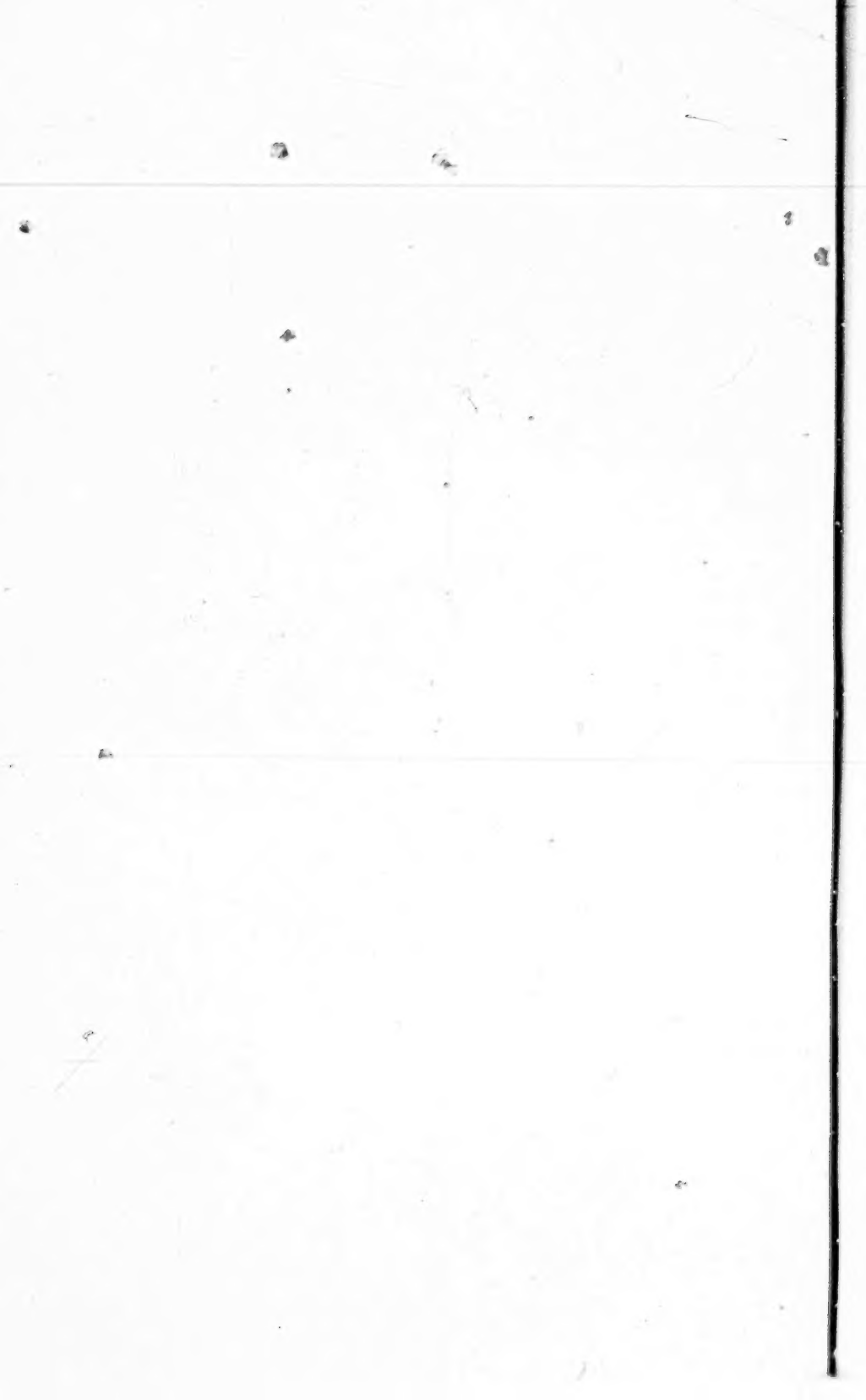
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**BRIEF OF RESPONDENT,
CITY OF MUSCATINE, IOWA.**

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals filed in the case, in which the petitioner intervened, were reported as follows: opinion on May 22, 1942, (R. 36-46), 128 Fed. (2d) 481; opinion of June 26, 1942, (R. 55-56), 129 Fed. (2d) 515; opinion of June 30, 1942, (R. 60-63), 134 Fed. (2d) 263; opinion of September 3, 1942, (R. 67-80), 131 Fed. (2d) 137.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13, 1925. (28 U. S. C. 347a).

STATUTE INVOLVED.

The relevant provisions of the Natural Gas Act of 1938 are set forth in the appendix, *infra*, pp. 23-26.

STATEMENT.

The statement of the case set out in the brief of Central States Electric Company, while liberally interspersed with arguments and legal conclusions is, we believe, substantially correct insofar as it contains an historical and chronological summary of the proceedings in the court below, except that petitioner again states that it became a party to the original proceedings on September 1, 1943, the date upon which its petition of intervention was filed in the court below. Actually, Central had been a party to the proceedings a long time prior to that date as evidenced by the fact that on June 29, 1942, it wrote a letter to the clerk of the court below (R. 56-59) which letter was in response to an inquiry made by the clerk and dated June 11, 1942, with respect to the fund in the possession of the court. Subsequently, and on November 24, 1942, the Circuit Court of Appeals entered an order in which it specifically found that Central States Electric Company had raised an issue as to whether it, or its consumers, were entitled to the refund, and directed that such amount should be segregated from the remainder of the fund and dealt with separately (R. 81-82).

The petition of intervention and amendments thereto filed by Central States Electric Company on September 1, 1943, was ancillary to the proceeding initiated by the Natural Gas Companies in the Court of Appeals for a review of the order of the Federal Power Commission directing them to reduce their rates to the distributing utilities who purchased their gas. Central States Electric Company was one of such distributors, and as much a party to the proceedings had in the court below as any of the other distributing utilities listed in the opinions, orders and

decree of the Court of Appeals, entered on May 22, 1942, (R. 36-46), June 24, 1942, (R. 51-52) and September 3, 1942, (R. 67-80).

We believe that it is correct to say that the record shows that Central States Electric Company did not by its petition of intervention become a new party to the proceedings, although it is true that the motion for leave to file the petition of intervention was its first formal entry into the case. The petition was, however, merely a restatement of the claim to the fund as against its customers, which had been embodied in the letter written by it to the clerk on June 30, 1942, more than fourteen months prior to the filing of its petition. In fact, the petitioner made no move to assert its claim for almost a year after the entry of the order of the court on November 24, 1942, in which the court below directed that the fund in question should be segregated from the remainder of the fund and dealt with separately. (R. 81-82).

At this point the respondent desires to briefly state its own relationship to these proceedings.

Prior to about November 8, 1943, the City of Muscatine had no knowledge or information with respect to the proceedings pending in the Circuit Court of Appeals entitled Natural Gas Pipeline Company of America, et al., vs. Federal Power Commission, et al., and numbered 7454 on the docket of that Court. On November 6, 1943, the court below entered an order providing that notice of the application of Central States Electric Company for leave to intervene and to claim the fund in controversy, be given to the municipality and mayor and city attorney of Muscatine, Iowa, etc. (R. 115-116) and such notice was received by the mayor and city attorney of the city a day or two thereafter. Pursuant to that notice the City of Muscatine, Iowa, responded to the petition of intervention of Central States Electric Company by filing its resistance thereto on December 1, 1943, (R. 116-121), and since that date the city

has appeared in the proceedings as they developed, in behalf of the customers of the Iowa Electric Company, the distributing subsidiary at Muscatine of the intervenor, Central States Electric Company, numbering more than 2400, and whose individual interests in the fund were too small to justify their appearance in the proceedings in their own behalf.

It was and is the view of the officials of the municipality that they were in equity bound to take all proper measures to safeguard the interests of these customers who were not in a position to act for themselves, even though such action involved considerable expense and no profit therefrom would or could accrue to the City. In other words, it was the opinion of the officials of Muscatine that since the gas rates paid by the customers of the Iowa Electric Company who lived in the city were fixed by ordinance, and these customers individually did not have a sufficiently large stake in the amount involved, (although that amount was a very substantial one in the aggregate), it was within the scope of its powers as a municipal corporation under the laws of the State of Iowa to appear in behalf of the large group of its citizens who were affected by the litigation and whose rights required protection. It is upon this basis that the respondent has taken part in these proceedings and is now before this court on this appeal.

As we understand the record, the question involved in this appeal is whether the court below erred in the distribution which it made in its order entered on February 14, 1944.

SUMMARY OF ARGUMENT.

In the brief of this respondent to the petition for writ of certiorari the following propositions were urged against the granting of the writ by this Court:

1. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by

the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers resided; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.

2. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.

3. The Court of Appeals has fully exercised its jurisdiction over the fund in dispute.

4. The petitioner has no right or interest, either legal or equitable, in the fund in question.

5. The City of Muscatine, Iowa, may lawfully administer the fund directed to be paid to its Treasurer by the order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of the Petitioner.

To the above propositions we now add the following:

6. Central States Electric Company is not, in any event, entitled to the fund in question upon the allegations contained in its petition of intervention filed in the court below, for the reason that all of the material allegations of said petition of intervention have been denied and contraverted by this respondent, and no proof in support thereof has ever been presented to the court by said intervenor.

ARGUMENT.

1. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers reside; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.

While the Petitioner's brief seems to attack only the jurisdiction of the court below to deal with that part of the "refund", (about one-half of one per cent of the whole amount), which it claims, its argument in support of that proposition applies with equal force to the balance of the fund which was distributed under the order and direction of the court to the consumers of the utilities involved, so that, in effect, the Petitioner is saying that the court of appeals had no authority to deal with the fund which came into its hands as the result of excess charges collected by the Natural Gas Companies during the period covered by the stay orders and until the decision of this Court was filed.

In its opinion filed May 22, 1942, (R. 36-46), the Court of Appeals declared that "responsibility for proper disposition of all excess charges is, under the original jurisdiction of this court and its ancillary powers as a court of equity, mandatory upon us; it is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made". (R. 45). Thereafter and on June 30, 1942, the Court filed a "Memorandum on Methods of Making Refunds to Customers of the Peoples Gas Light and Coke Company," (R. 60-63) in which reference is made to the fund now claimed by Petitioner, and it

there stated its holding that all refunds which petitioners (Natural Gas Companies) must make, belong to the consumers. In that connection the Court said:

"Associated with this problem of costs, one utility serving Nebraska City asks that the refund go to it and not to its customers. That it and others may know and plan accordingly, we express our conclusion, and our holding, which is **all refunds which petitioners must make, belong to the consumers**, for whose benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities. The price paid by the utilities was fixed by contract. It, together with cost of services and interest, etc., was what made up the utilities bill to their consumers. * * * The proceedings which were instituted by Federal Power Commission and furthered by the Illinois Commerce Commission to reduce the natural gas cost to the utilities were for the benefit of the consumers. They so declare. Most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them. An exception is the Nebraska City utility, which believes it is the beneficiary of a wind-fall, to which it intends to hold on, if once it can get possession of it. It entertains the old and out-moded conception of utility magnates and utility counsel which overlooked the trustee status of a public utility, whose excuse for existence is service to the public to whom it owes the duty to diligently endeavor to render ever better service at lower rates, as well as to earn a fair return on the capital invested in it. In fact it was the position of counsel for the Pipeline Company in the U. S. Supreme Court that under no circumstances could the utility claim any refund and that if anyone was entitled to the refund, it would be the consumers."

And in dealing with the contention of Petitioner that a refund to the consumers constitutes an interference by the Court with the contractual relationship existing between a

local distributor of natural gas and the ultimate consumers of such gas, the Court further said (R. 63):

"A public utility located in Nebraska City and another located in Iowa held contracts with petitioners. As between the two contracting parties, their contract would be binding, but the business of the petitioners was subject to regulation by the Federal Power Commission and also in part by the Illinois Commerce Commission. These two bodies sought to reduce charges to the consumers. As between petitioners and utilities they were not interested, but these boards were interested in reducing charges to the consumers. For the consumers the Federal Power Commission acted. Petitioners so understood the nature of the contract and defended on the ground that they had no contract with these consumers and owed nothing to them as consumers, — nor were they subject to Federal regulation for the consumer's benefit. Nebraska City and all other utilities stood by and accepted the situation as it was tendered by the pleadings and the parties. Now one or two of these utilities located where no state supervisory commission exists, are endeavoring to sieze the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome if they were to succeed. With their efforts in this respect, we have no sympathy. The court will make an order on this finding that the money refunded by petitioners belongs to the consumers and none belongs to the utility or utilities."

The position of the court below as above stated is in conformity with a principle of general application that when a court restrains enforcement of a legislative order fixing utility rates, whereby the utility is permitted to make and collect charges in excess of those specified in the rate order, it is the duty of such court, if its restraining order is finally vacated and set aside, to retain jurisdiction to distribute in accord with the principles of equity the fund created by such excess charges, having particular regard for the interest of the public in whose behalf the

rate order was entered. This rule has been consistently adhered to by this Court. In any case where the Court, reversing an injunction of the lower court, remands the cause with general directions to proceed in accord with justice and equity, the above rule is applied, and it becomes the duty of the lower court to continue to deal with the case until the fund accumulated under the injunction has been justly disposed of.

United States v. Morgan, 307 U. S. 183, was an appeal from an order of the district court respecting the disposition of funds impounded in litigation over the validity of an order of the Secretary of Agriculture, fixing stockyard rates, which the Supreme Court had theretofore held invalid for want of due procedure (298 U. S. 468). The Supreme Court said, as to the duty of the district court in dealing with the fund, at page 191:

"The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see **Ford Motor Co. v. National Labor Relations Board**, 305 U. S. 364, 373; **Inland Steel Co. v. United States**, 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

And at pages 193-194:

"But, as we shall presently point out, when the alleged excessive rates are in **custodia legis**, the court has authority and is under an equitable duty to dispose of them according to law and justice. * * *

"The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the fund

upon the termination of the litigation. The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect."

Inland Steel Company v. United States, 306 U. S. 153, stated the principle with equal clearness. There the Interstate Commerce Commission had ordered certain railroads to cease the payment to shippers, in conformity with a filed tariff, of switching charges which the Commission had found to be unlawful. On review of the action of the Commission the district court stayed the Commission's order and directed the railroads, pending final disposition of the cause, to place further payments due under the tariff in a special fund to be held subject to the order of the court. The Commission's order was ultimately sustained, but meanwhile the Commission, pending review in the courts, had postponed the effective date of its order, so that during the litigation there was no operative Commission order forbidding the unlawful payment. The shippers contended that the fund must be paid over to them because it was accumulated in the absence of a controlling order of the Commission. This Court rejected this con-

tention holding that the district court had a duty by reason of its issuance of the injunction to make an equitable disposition of the fund. It said, at pages 156-157:

"In granting the interlocutory injunction, the District Court proceeded under a jurisdictional Act which provides that * * * the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.' Appellant invoked the court's equity powers.

* * * Now, the litigation ended, appellant insists that the District Court lacked jurisdiction to do more than vacate its interlocutory injunction and dismiss the petition, since no pleadings of the Railroad or the Commission sought the creation of the special allowance account. But this overlooks the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may effect. And the Commission, in defending its report and order, acted under its statutory duty as the representative of the interest which the public, as well as the railroads, have in the maintenance of fair, reasonable and non-discriminatory transportation practices."

In Ex Parte Lincoln Gas Co., 256 U. S. 512, it appeared that previously this Court (250 U. S. 256) had held that a decree of the district court enjoining a certain gas rate ordinance should be modified in certain respects. The mandate provided that upon the decree as so modified and affirmed, "such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." Upon the filing of this mandate the district court entered an order modifying its decree as required, and also made an order retaining jurisdiction for the purpose of requiring the gas company to make refunds and

restitution to its consumers for all amounts paid by them over and above the legal rate pending the litigation, in accordance with the terms of a certain bond which had been given by the gas company to obtain a supersedeas pending the original appeal. The gas company appealed from that order and the appeal was dismissed (253 U. S. 477) because the decree lacked finality. The mandate which followed was "that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." On this second mandate the district court appointed a master to examine the books of the gas company and to state an account of the amounts paid to it by consumers in excess of the ordinance rates during the pendency of any restraining order or injunction in the cause. The gas company then applied to this Court for a writ of mandamus to compel the district court to nullify and revoke its last order and to refrain from assuming jurisdiction over the cause. The principal contention of the company was that under the two mandates of the Supreme Court the district court did not have jurisdiction to take any action other than to dismiss the suit. The court said (256 U. S.), at pages 516-517:

"It is said that, after an appeal, the court below has jurisdiction to proceed only in conformity with the direction of the mandate of the appellate court. This may be conceded. But here our mandate expressly commanded 'that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.' Of course, whatever proceedings were taken thereafter in the same cause would be **further** proceedings; and the absence of the particular word 'further' from the mandate is of no consequence. Emphatically the command called for proceedings in the nature of execution according to right and justice and the laws of the United States. The necessary meaning is that the court below should proceed to carry our decision into

full effect according to right and justice; and, manifestly, this could not be done without proceeding to enforce the supersedeas bond according to its terms."

And as to the existence of a large number of claimants tending to show the necessity for equitable relief, the court also said, at page 517:

"It recognized that the consumers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due them, to see to its collection from the company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause. To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate."

In *in Re City of Louisville*, 231 U. S. 639, a telephone company brought suit in the district court to enjoin the enforcement of a city rate ordinance. A permanent injunction was granted. The company kept an account of all sums collected in excess of the rates fixed by the ordinance and agreed on final determination of the matter to pay such sum into court for distribution among those entitled to it if the ordinance rates were finally sustained. The permanent injunction was reversed by this Court (225 U. S. 430) which remanded the case "for further proceedings not inconsistent with the opinion of this court." The district court set aside its original decree and restored the case to its docket. It appointed a special master to take proofs and ordered refunds to the parties entitled thereto. In 231 U. S. 639, the telephone company attempted to secure a writ of mandamus directing the district court to vacate the order of reference. In holding that the district court

did not abuse its discretion in making the order in question, this Court said, at page 645:

"It is further alleged the amounts collected in excess of the ordinance are a trust fund held by it for the benefit of the patrons of the company as their rights may appear and that they are entitled to have restitution made to them by the District Court, and that therefore the litigation between the company and the city should not be dismissed absolutely, but should be retained on the docket for the purpose of having collected and distributed the excessive collections. And this relief is prayed in addition to the mandamus.

"Due return to the rule was made. It is, in effect, that the court considered the opinion and decree of this court permitted a discretion to retain the case for an actual experiment of the rates, and, thus considering it, made the order of March 10, 1913.

"We think the discretion was properly exercised."

It is thus entirely clear that in the case at bar the court, having created this fund by the exercise of its equitable powers, is charged with the responsibility of disposing of the fund in accordance with principles of equity and hence is necessarily vested with complete jurisdiction to do so. All of the above cases involved the jurisdiction of district courts in similar circumstances. This circumstance, however, creates no distinction. As stated in Montgomery's Manual of Federal Jurisdiction and Procedure, 4th Edition, 1942, page 897: "In respect of orders of federal boards and commissions, the jurisdiction of the circuit courts of appeals is original rather than appellate."

2. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of the ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.

The petitioner argues that Section 1(b) of the Natural Gas Act which declares that it "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce, of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution," limits the power and authority of the Federal Power Commission under the Act to the transportation and sale of natural gas in interstate commerce, and since the Act contains no express provision that rates charges by natural gas companies in excess of rates fixed by the Federal Power Commission shall be refunded to the ultimate consumers, there is no way by which either the Commission or a court could authorize such refund within the term of the Act.

If the contention of the Petitioner is correct, the Natural Gas Act would become a nullity so far as public interest is concerned, since the benefit of any rate reduction ordered by the Federal Power Commission and which became the subject of litigation would never reach the ultimate consumer until **after** the validity of such order had been finally adjudicated in the courts, and in the interim the excess charges collected by the natural gas companies would accumulate for the enrichment of the distributing utilities, such as Petitioner, notwithstanding the fact that they were at the same time collecting such excess charges from their customers, under rate schedules in effect before the reduction was ordered by the Power Commission. True, Section 4(e) of the Natural Gas Act does require the natural gas companies, in the event that they increase their rates, "to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon comple-

tion of hearing and decision, to order such natural gas companies to refund, with interest, the portion of such increased rates or charges by its decision not found justified." This is by no means the same thing as a refund of excess charges which the Power Commission has ordered to be reduced, as in this case, and which excess charges are incorporated in existing rate schedules and thereby passed on to the consumers. With the exception of the Petitioner and the Nebraska City utility, all of the distributors who purchased gas from Natural Gas Companies recognized the justice of the proposition that this fund should be returned to the ultimate consumers, and the contention of the Petitioner that its rate schedules in the City of Muscatine were not subject to the control or supervision of a state commission, but were established by it to meet competition, in no way alters or affects the fact that it did, during the refund period, collect from its customers in Muscatine for gas used by them upon the basis of a rate schedule adopted, freely and voluntarily and by agreement with the City Council of the City, while the excess charges were being collected by the Natural Gas Companies, and which rate schedule was unquestionably based upon the price paid by Petitioner to the Natural Gas Pipeline Company for the gas it sold to Muscatine consumers.

It would be strange indeed if the action of the Power Commission in reducing the rates of the Natural Gas Companies to the distributing utilities could enure to the benefit of the consumers living in states which have supervisory commissions, but such benefit would be denied to those members of the gas using public who resided in states which do not have such commissions. The Court of Appeals rightly refused to place such an absurd construction upon the Natural Gas Act in its denial of the petition of intervention filed by Central States Electric Company.

3. The court of appeals has fully exercised its jurisdiction over the fund in dispute.

The of Petitioner's contentions, as stated in paragraph 3 on page 18 of its brief, is that the court below erred by directing payment of said fund to the four municipalities involved, because said action disregarded the mandatory duty of the court below to exercise its limited jurisdiction to adjudicate Central's right to said fund.

We submit that the Court did exercise its full jurisdiction with respect to this fund. In its order entered February 14, 1944, the court expressly found that a part of said refund, in the aggregate amount of \$25,708.54, belonged to the consumers of gas residing in the cities of Muscatine, Greenfield, Knoxville and Pella, and directs the payment of specific portions of the total sum to the treasurers of the respective municipalities, for the use and benefit of such consumers, the amount to be paid by the Clerk of the Court to the Treasurer of Muscatine being \$20,823.00. In the same order the court, while denying the petition of intervention, did so without prejudice to the intervenor's making a claim for said moneys in the hands of the city Treasurer, if it desired to do so; but this does not alter the fact that the court below **did** dispose of the fund and directed the payment to those in whose interest the Federal Power Commission had acted in the first place. The order of February 14, 1944, was of exactly the same character as that entered on September 3, 1942, in which distribution of approximately 99½ per cent of the fund of \$6,377,913.52, representing the excess charges collected during the refund period, was directed to be made to the ultimate consumers of gas who were customers of the various utilities affected, only the mechanics of distribution being different, and was made without any contest or objection on the part of the distributing utilities, which have, with one exception aside from the petitioner, acquiesced in the finding of the Court that the refund belonged to the ultimate consumers and not to them.

4. The petitioner has no right or interest, either legal or equitable, in the fund in question.

While admitting that the Natural Gas Act was enacted in the public interest, Petitioner still asserts that it has a legal right to the fund because it paid the excess charges in the first instance to the Natural Gas Companies, and says further, "the Federal Power Commission having discharged its duty by ordering a reduction of interstate rates, is powerless to follow through and order any change in past or future rates paid or to be paid by the ultimate consumers, since that is a function entirely within the field of State regulation." (Brief pp. 41-42). Going a step farther, the Petitioner says (brief p. 45): "Whether under Iowa law the consumers could enforce a claim against Central by way of reparation is uncertain. Central believes, however, that it is not required in the instant case to speculate upon what the Iowa law in that regard may be. Suffice it to say that a mere claim of failure on the part of State machinery to accomplish equity for the consumer is not a proper basis on which to predicate the exercise of Federal jurisdiction over any part of the field in which State regulatory power is supreme."

If these cynical conclusions as to the rights of the Federal Power Commission and the jurisdiction of the Courts under the Natural Gas Act, are correct, it is a little difficult to see how the public interest is served by the Act. That petitioner's conclusions are not in conformity with the decisions of this Court is plainly indicated by the cases cited under the first division of this argument.

So far as the payment of these excessive charges by Petitioner is concerned, those charges were reflected in its rate schedules in effect in the City of Muscatine during the period covered by the refund, and its customers there paid for gas upon the basis of the rates paid by it to the Natural Gas Company. Notwithstanding the fact that Iowa has no supervisory utility commission, it will not be denied

that the gas rate schedules adopted by the City Council of the City of Muscatine were the result of negotiation between the Council, acting for the citizens of Muscatine, and the utility, and were not arbitrarily forced upon the utility by the Council. Petitioner averred, in its petition of intervention, that the rate schedule adopted in Muscatine was voluntarily reduced by it at various dates between August 1936 and February 4, 1943. Such action is hardly consistent with its claim that the rates in effect in Muscatine were inadequate to furnish a proper return upon the capital invested. In this connection, it should be noted that there is no evidence in the record that Petitioner ever invoked the aid of the Power Commission to secure a reduction in the rates it was paying the Natural Gas Pipeline Company, nor did it ever take any other action in that direction. It was a party to the original proceedings, however, in the same manner as the other distributors who purchased gas from the Natural Gas Companies were parties thereto; it addressed a letter to the Clerk of the Court of Appeals setting forth its claim to the fund, in June 1942, but thereafter did nothing further to present its claim to the Court until fourteen months later, on September 1, 1943, when it filed its petition of intervention.

Petitioner says that the stay orders of the court below and the bonds filed by the Natural Gas Companies were particularly designed for its protection and the protection of the other purchasers at wholesale, and in support of that contention cites the case of **In the Matter of Lincoln Gas & Electric Co. 256 U. S. 512** (Brief p. 50). We do not understand how this case can give any comfort to Petitioner. This was a case in which a bond had been filed conditioned for payment of the excess rate, and the city and its officials were representatives of consumers. The Court said:

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in

privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection."

Petitioner having been once reimbursed for the excess charges paid by it to the Natural Gas Companies during the refund period, by means of the revenue received from its customers in Muscatine, cannot now claim any legal, moral or equitable right to collect such charges once more out of the fund in the registry of the court below.

5. The City of Muscatine, Iowa, may lawfully administer the fund directed to be paid to its Treasurer by the Order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of Petitioner.

Petitioner denies the authority of the City of Muscatine, Iowa, through its Treasurer, to take the fund as directed by the order of the Court entered February 14, 1944. Upon this point we believe it sufficient to say that under the statutes of Iowa, and particularly Section 6143 set out in the Appendix to Petitioner's Brief, cities and towns, including cities under special charter, such as Muscatine, have power to act for and represent their citizens in the regulation of rates and service of public utilities of all kinds, and to adopt ordinances fixing such rates. If they may act for their citizens in such matters, no good reason suggests itself why they should not be competent to act for their citizens when, as customers of a utility, they

become entitled to a refund from such utility, and where the number of such customers is large and the amount of their individual interest in the refund is small, so that the prosecution of his claim by the individual consumer would be impractical, burdensome and the cost prohibitive.

6. Central States Electric Company is not, in any event, entitled to the fund in question upon the allegations contained in its petition of intervention filed in the court below, for the reason that all of the material allegations of said petition of intervention have been denied and contraverted by this respondent, and no proof in support thereof has ever been presented to the Court by said intervenor.

In its petition of intervention the Petitioner made certain allegations with respect to the alleged return upon its investment in the sale and distribution of gas to the citizens of Muscatine, and to support these allegations attached an exhibit to the petition allegedly setting out the percentage of net return over a period of years. These figures, as well as all the material allegations of the petition of intervention were expressly denied and fully controverted in the resistance filed in behalf of the consumers by the City of Muscatine. The court below held that these allegations and claims and the supporting exhibits were immaterial to its disposition of the refund, and no evidence was ever offered or submitted to the court by the Petitioner in support of such allegations. As we view it, they are not material now, since the findings and decisions of the court below, in determining that the entire refund should be paid to the customers of the various utilities, was based upon the fair and reasonable assumption that the excessive price paid by the distributing utilities to the Natural Gas Companies had been included in the rates paid by their consumers during the refund period. That this is true, insofar as Central States Electric Company is concerned, is borne out by the fact that according to its own

statement the rate schedule in Muscatine was voluntarily reduced by it at various times between August, 1936 and February 4, 1943. Such action on its part is hardly consistent with the claim that it was not receiving a fair return upon its investment during that period. In any event, as the record stands, these claims and assertions by Central are wholly ex parte, and it certainly should not be entitled to any part of this fund upon the basis of such unsupported allegations.

It is therefore respectfully submitted by the City of Muscatine, speaking for the 2432 customers of Petitioner's assignee who are entitled to share in this refund, that the relief prayed by the Petitioner in this proceeding should be denied by the Court, and that the findings and decision of the court below with respect to the distribution of the fund in question should be affirmed.

MATTHEW WESTRATE,

*Attorney for Respondent,
City of Muscatine, Iowa.*

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C., § 717 et seq.), are as follows:

Section 1.(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Rates and Charges; Schedules; Suspension of New Rates.

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Fixing Rates and Charges; Determination of Cost of Production or Transportation.

Sec. 5. (a) Whenever the Commission after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: **Provided, however,** That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Rehearings; Court Review of Orders.

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing withing thirty days after the issuance of such order. The application for

rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evi-

dence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

SUPREME COURT OF THE UNITED STATES.

No. 85.—OCTOBER TERM, 1944.

Central States Electric Com- pany, Petitioner, vs. City of Muscatine, Iowa, et al.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
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[February 12, 1945.]

Mr. Justice ROBERTS delivered the opinion of the Court.

We are concerned in this case with the nature and extent of the powers of a federal court sitting to review an order of the Federal Power Commission.

The decision of the court below denied the petitioner's application for payment to it of a fund of some \$25,000 deposited in court, and directed its payment to persons not privies to the transaction which created the fund. A detailed recitation of events is required to show how the question arises.

The Federal Power Commission (hereinafter called Commission), proceeding under the Natural Gas Act,¹ entered an order against the Natural Gas Pipeline Company of America (hereinafter called Pipeline) requiring it to cut its rates on natural gas to effect an annual reduction in revenue of not less than \$3,750,000, effective September 1, 1940.

The petitioner, Central States Electric Company (hereinafter sometimes called Central), an Iowa corporation doing a public utility business in that State and elsewhere, purchased gas at wholesale from Pipeline and distributed it in Iowa.

Pipeline sought a review of the Commission's action by the Circuit Court of Appeals. The court set aside the order but, on certiorari, we reversed and sustained it.² At the inception of the case Pipeline had petitioned for a temporary stay and the court below had granted a stay on condition that a bond be filed to secure the refund to purchasers at wholesale of the amounts respectively due them if the court should sustain the reduction of rates ordered by the Commission. On the dissolution of the tem-

¹ 52 Stat. 821; 15 U. S. C. § 717.

² Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575.

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porary stay another was entered to continue until the further order of the court, conditioned that Pipeline should enter a second bond in the same terms. This was done.

When this court rendered its judgment sustaining the rate order Pipeline became liable to make refunds in accordance with the bond. The court below, prior to the payment of the amount due under the bond, filed an opinion holding that it was its duty to take exclusive control over the refund when made and to determine the rights of all claimants in the fund, and made an order enjoining claimants to the fund from further proceeding in any other court. This action was pursuant to a petition of Pipeline showing that suits were being filed against it in other courts by the ultimate consumers of the gas sold by Pipeline to the local distributing companies and alleging that unless the court retained jurisdiction of the fund Pipeline would be subjected to numerous similar suits. Illinois Commerce Commission, in an answer, stated that the rates charged by distributing companies in Illinois were fixed by it and reflected the prices paid by distributors to Pipeline and that the refund, representing excessive rates paid by distributors, had been collected from the ultimate consumers and was equitably due them. The Illinois local distributors then before the court agreed that the refund should be ratably paid to the ultimate consumers.

Central was not a party to the proceeding in the Circuit Court of Appeals, but, on June 29, 1942, it sent a letter to the Clerk, in response to one from him, asserting that the portion of the refund representing excessive rates paid by Central during the refund period should be repaid to it and not to the ultimate consumers. June 30, 1942, the court rendered an opinion in which it discussed the relative rights and interests of local distributors and ultimate consumers. The court found that, since the rates charged to local consumers included the excess charges paid by distributors to Pipeline, the ultimate consumers were in equity entitled to receive the refund. July 1, 1942, Pipeline paid into court a sum representing that portion of the rates paid to it in excess of the rate permitted by the Commission's order. The court thereupon entered an order to show cause, which specified the refund period, determined that the amount paid into court was the property of the ultimate consumers, and allocated the fund to the customers of the local distributors, including Cen-

tral's customers, (to whom there was allocated \$25,708.54), reserved jurisdiction of the fund for the protection of all persons having rights therein, and directed all claimants to the fund to show cause why the order should not be binding on them. Later the court entered an order in which it found that Central had raised an issue concerning the relative rights of itself and its customers to the amount in question. Central, which, as we have said, had not become a party to the proceedings, then filed a petition in intervention praying that the sum be paid to it, and leave to intervene was granted. Central's petition set forth that it purchased natural gas from Pipeline during the refund period, pursuant to a contract, that the sum in question represented amounts paid by Central during the refund period in excess of the rates fixed by the Commission's order; that Central sold more than 81% of the gas in question without profit to Iowa Electric Company, which resold the same to some 2400 consumers in Muscatine, Iowa, and that Central sold the balance directly to some 320 consumers in Greenfield, Iowa, 597 in Knoxville, Iowa, and 366 in Pella, Iowa; that less than 12½% of the gas sold in Knoxville and Pella was natural gas; that Iowa Electric Company had transferred all its rights in and to the fund to Central for the purpose of these proceedings; that, by the law of Iowa, the power to fix rates for gas service is vested in its municipalities, and the utility rates in that State are not regulated by any State agency or commission; that rates to consumers had been voluntarily reduced to meet competitive conditions and that such rates had been approved by resolution of the Council of Muscatine; and that, due to conditions in the communities serviced, the rates charged consumers were insufficient to produce a fair return.

Thereafter the court entered an order directing that the Attorney General of Iowa and the purchasers of gas from Central, and their respective municipal representatives in Muscatine and Greenfield, be notified of Central's claim to the fund, and that they show cause why the relief sought by Central should not be granted. No such order was made with respect to consumers in Knoxville and Pella nor to any officials of those cities. The City of Muscatine and the Mayor of Greenfield, purporting to represent the consumers in those cities, filed separate pleadings in which they asserted that the fund in question belonged to the consumers.

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The court, without hearing evidence, denied the relief prayed by Central by an order which was stated to be "without prejudice" to Central's "making claim of adjustment with the cities of Muscatine, Greenfield, Knoxville and Pella . . . or with the consumers of gas furnished by it in said cities." The reason stated for making the order was that the court was without jurisdiction to hear Central's claim since it involved a determination of "the reasonableness of petitioner's rates" and further since the court had previously ruled that the refund belonged to the ultimate consumers. In a separate order entered the same day the court directed payment of the sum in question to the treasurers of the several cities in specified amounts. It fixed the amount allocated to Muscatine at 81% of the fund, apparently relying upon the allegation of the petition that more than 81% of the gas purchased from Pipeline was delivered to consumers in that city. It apparently failed to give consideration to the allegation that less than 12½% of the gas sold in Knoxville and Pella was natural gas. The order recited that the fund belonged to the ultimate consumers and that the court desired to pay it at the earliest possible time to "such parties as are entitled to the same, and to permit of a determination of said rights by a court or body having jurisdiction thereof." Thereafter Central filed a supplemental petition setting forth that, except for the stay order, Central would have retained the sum in question; that Central was the only party in privity with Pipeline and was, therefore, entitled to the benefit of the rate reduction, and that the bond filed pursuant to the court's order called for payment of the refund to purchasers at wholesale, one of whom was Central. It further attacked the jurisdiction of the court to award the sum to Central's ultimate consumers since such an award amounted to a retroactive reduction of local rates to which the Natural Gas Act, by express terms, did not apply, and, finally, asserted that the court ought not to make the award based on a conclusion of fact unsupported by any evidence that the burden of the excessive rates had been passed on to the consumers whereas the court, at the same time, disclaimed jurisdiction to determine the reasonableness of local rates and, therefore, refused to hear evidence of Central's equitable right to the fund. Muscatine and the Mayor of Greenfield responded. The court denied the petition without hearing or argument.

The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power upon it, to fix or adjust Central's rates, that being a legislative function of the State of Iowa. This would be so where the fund in dispute came into its possession in a proceeding to enjoin the operation of an order affecting state rates,³ and must be equally true where the proceeding was one to enjoin collection of a rate for interstate service. This, because the court below had no power as a court of equity to fix rates, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa. The court below so held in this case, and has dealt with the matter more fully and to the same effect in another.⁴

The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act,⁵ but from the exceptionally explicit legislative record,⁶ and from this court's decisions.⁷

The showing made by the petitioner's pleadings, and not denied, is that in Iowa rates are set by municipal ordinance; that the rates collected from consumers during the refund period were the lawful rates, so fixed; and that the sums impounded were deducted from the payments to Pipeline by Central out of its own funds. The only reply made by the municipal authorities is that the fund belongs to the ultimate consumers. Whether this is so, whether under Iowa law reparation may be demanded for sums paid by consumers under a standing rate, we do not know. Nor do we know who are proper parties under Iowa law to any proceeding

³ *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, 271, 272.

⁴ *Natural Gas Pipeline Co. v. Federal Power Commission*, 141 F. 2d 27.

⁵ See, e. g. Sec. 2(8), 15 U. S. C. § 717(a)(8); Sec. 5(p), 15 U. S. C. § 717d(a); Sec. 13, 15 U. S. C. § 717i; Sec. 14a, 15 U. S. C. § 717m(a); Sec. 15a, 15 U. S. C. § 717n(a); Sec. 17(a), 15 U. S. C. § 717(p).

⁶ H. R. No. 709, 75th Cong., 1st Sess., pp. 1-3.

⁷ *Public Utilities Comm. of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467; *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 609-610.

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to determine the relative rights of petitioner and its customers. Certainly these are questions of Iowa, not of federal law.

We are of opinion that the court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute. *United States v. Morgan*, 307 U. S. 183, on which the respondents rely, is obviously distinguishable. There the fund impounded was part of the charges paid to the stockyard merchants by persons who had been charged the rates found by the Secretary of Agriculture to be excessive. Here, since the fund represents a portion of sums paid by Central to Pipeline out of Central's funds and pursuant to contract with Pipeline, the *Morgan* case would be authority for repayment to Central. This is true also of *Inland Steel Co. v. United States*, 306 U. S. 153. Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers.⁵

The ultimate consumers' rights being such as the law of Iowa affords, there is no reason for the payment of the fund to municipalities or municipal officers under a quasi trust for those found ultimately entitled, thus placing the burden on Central to pursue the cities or their officers for its recovery. An order to this effect is certainly not within the court's jurisdiction as a federal court of equity. The most the court below should do, in view of the apparent controversy as to the consumers' right to a refund of rates heretofore paid to Central, is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to Central, and that if it be adjudged, as a result of such litigation that Central is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to its disposition.

The judgment is reversed and the cause remanded for further proceedings in conformity to this opinion.

So ordered.

⁵ *Southern Pacific Co. v. Darfield-Taenzler Lumber Co.*, 245 U. S. 531.

Mr. Justice BLACK, dissenting.

The primary purpose of Congress in passing the Natural Gas Act was to protect ultimate consumers of gas from excessive prices. *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 610, 612. The Court's decision today defeats that Congressional purpose, for under its interpretation of the Act the petitioner, a retail gas distributor, is awarded a 'windfall,' at the expense of the very consumers the Act was designed to protect.

On September 23, 1938, a petition praying for reduction of the wholesale gas rates of the Natural Gas Pipeline Company was filed with the Federal Power Commission. July 23, 1940, the Commission ordered the Company to make reductions in its future rates. The Circuit Court of Appeals, upon the Company's petition, then granted a stay pending litigation. Later, it stayed enforcement of the order. 120 F. 2d 625. As a condition of its stay, the Circuit Court of Appeals required the Company to execute a million dollar bond running to the Federal Power Commission and the Illinois Commerce Commission. On March 16, 1942, this Court reversed the cause and sustained the Commission's order. 315 U. S. 575.

Subsequently, \$6,377,913.57 was paid into the court by the Pipeline Company, this being the amount it had collected, pending the litigation, from Illinois, Nebraska, and Iowa gas distributing companies, in excess of the rates fixed by the Commission.

The Pipeline Company, and all of the distributing companies except petitioner here and one small company in Nebraska,² acquiesced in the holding of the court below that the funds thus impounded properly belonged to the ultimate consumers, and should be refunded to them. All of this amount, \$6,377,913.57, except for the \$25,708.54 now ordered by this Court to be paid to the petitioner, has been distributed to the ultimate consumers.³

¹ The court below refused to construe the Natural Gas Act so as to make this petitioner "the beneficiary of a windfall, to which it intends to hold on, once it can get possession of it."

² This company subsequently settled with its consumers by turning over to them approximately 70% of the funds allocable to its purchases.

³ June 30, 1942, after a notice had been issued to petitioner Central, the Court held that all refunds "belong to the consumers, for whose benefit these proceedings were instituted." Central did not actually intervene until fourteen months later. With reference to this delay of Central's, the court below said in its June 30, 1942 order that "Nebraska City and all other utilities stood by and accepted the situation as it was tendered by the pleadings and the parties. Now one or two of these utilities located where

l.c. The Court holds that the disposition of such funds must be made in accordance with State law and that the Circuit Court of Appeals was without jurisdiction to dispose of them as it did. Until today, this Court seems never to have doubted that "it is a power inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process". *United States v. Morgan*, 307 U. S. 183, 197. Here, consumers of gas have been injured by a federal court order staying the Federal Power Commission's 1940 rate cut. In 1942, this Court sustained the Commission's order, 315 U. S. 575. At that time, the Pipeline Company contended before this Court that if the Commission's rate order should be sustained, the fund accumulated as a result of the stay should be retained by it, and should not be turned over to the distributing companies because "the purpose of the rate regulation is the protection of consumers and . . . will not be effectuated by refunds to wholesalers" of their "profits for past business." Upon our remand of the cause for further proceedings, the Pipeline Company petitioned the court below to take jurisdiction of the excess funds. That court held, in impounding the fund here involved, that since it was authorized by Sections 19(b) and (c) of the Act to issue a stay pending review of the Commission's rate order, it had a mandatory obligation as a court of equity "to determine to whom and in what amounts the distribution shall be made." This holding was in accord with "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co. v. United States*, 306 U. S. 153, 157.

l.c. The injury to the consumers here did not stem from state law or the action of a state court; it was the direct result of stay orders made by a Federal Court. These orders, which permitted the Pipeline Company to continue to charge rates which the Com-

no State Supervisory Commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome, if they were to succeed. With their efforts in this respect, we have no sympathy." Without going into a narration of what later occurred, I am of opinion that the court rightfully denied Central's intervention on the ground that it had long since decided the question. The importance of the rule announced by the court, however, prompts me to discuss it.

mission had determined to be excessive, to the detriment of ultimate consumers, were issued under the provisions of the Natural Gas Act. The injuries here were therefore occasioned by the application of federal law in a Federal Court, and raised federal, and not state law questions. For a federal court to remedy this injury by affording that protection to consumers which the act contemplated, cannot, in my judgment, be said to amount to a regulation of local gas rates. l.c.

The Natural Gas Act contemplates that federal reduction of wholesale gas rates to distributors will be reflected in reduction of retail rates to the ultimate consumers. Information before the Congress when it passed the Natural Gas Act showed that a large percentage of the retail cost of gas was attributable to the wholesale cost.⁴ Thus, the wholesale cost is a critical element in a state proceeding to regulate retail cost. An effective order of the Federal Power Commission reducing wholesale costs affords local consumers a basis for a corresponding retail reduction. But a federal rate reduction order cannot be utilized before state regulatory agencies where the federal reduction order has been stayed by a federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies. The City of Muscatine, Iowa promptly passed an ordinance reducing local gas rates *after* vacation of the orders staying enforcement of the Power Commission's rate reduction.

Ultimate consumers can secure benefits from a federal rate reduction in two ways: (1) by using the order to get reduced rates before their local regulatory bodies; (2) by the impounding of funds for their benefit if a judicial stay of the federal reduction order is granted. The stay deprived these local consumers of a chance to use the Commission's order to obtain a local rate reduction. The holding of this Court partially, if not completely, deprives them of the benefits of the impounded funds. Cf. *First Nat. Bank v. Flershem*, 290 U. S. 504, 520.

⁴ See Final Report of the Federal Trade Commission to the Senate, Sen. Doc. 92, Part 84-A, 70th Cong., 1st Sess., pp. 611, 612; Cong. Record, 75th Cong., 1st Sess., vol. 81, pp. 6723, 6725, 6728; Hearings Before the House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess., on H. R. 4008, pp. 27, 38-39, 56-57; Hearing on H. R. 11662, House Subcommittee on Interstate & Foreign Commerce, 74th Cong., 2d Sess., pp. 25, 34-35, 81.

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To deny petitioner distributing company a refund of the impounded monies would impose no deprivation upon it. Petitioner's local rates were fixed by a Muscatine city ordinance, to which rates the petitioner alleges it voluntarily agreed. That schedule of rates, petitioner argues, was "presumptively reasonable."⁵ Petitioner admits that Iowa law requires the wholesale cost of gas to be one of the factors considered in determining the reasonableness of rates.⁶ The petitioner's rates must therefore be considered reasonable on the basis of the old wholesale price of gas, and any increment above those rates is a "windfall."

Furthermore, the petitioner says it was free under Iowa law to attack the rates at any time as too low. This, it never did. Instead, it refrained from doing so until this Court had sustained the Commission's order reducing wholesale rates, and until the Circuit Court of Appeals had adjudged that the monies belonged to the consumers. Not until then did it file its intervention claim for the impounded funds. The reason for this delay is not difficult to find. Petitioner, in arguing here that it should get this impounded fund, asserts that under Iowa law "municipalities may only fix rates prospectively." Iowa cases cited by the petitioner seem to give some support to this contention, especially when considered with decisions of this Court dealing with analogous statutory situations.⁷ I am therefore unable to see much likelihood of these consumers obtaining relief in the Iowa state courts for the injury they have suffered as a result of the federal court's action in granting a stay of the Federal Power Commission's order.

If my previous analysis is correct, the rule announced by the Court today means simply this: So long as litigation can be kept pending in the courts as to the validity of a Federal Power Commission rate deduction order, the benefits of the Natural Gas Act will be suspended as to ultimate consumers, and will be largely, if not exclusively, restricted to retail distributors.⁸ Thus, by a

⁵ Petitioner cites in support of its argument, *Iowa Railway and Light Co. v. Jones Auto Co.*, 182 Iowa 982; *Town of Williams v. Iowa Falls Electric Co.*, 185 Iowa 493; *Knotts v. Mallen*, 206 Iowa 261; *Incorporated Town of Mapleton v. Iowa Public Service Co.*, ~~206 Iowa 261~~.

⁶ See *Cedar Rapids Gas Co. v. Cedar Rapids*, 144 Iowa 426, aff'd 223 U. S. 655.

⁷ See note 5 *supra*.

⁸ Cf. *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456; *Arizona Grocery v. Atchison Ry.*, 370 U. S. 370, 389.

⁹ When a rate schedule embodying a proposed increase in wholesale rates becomes effective, pending a determination by the Commission of the reason-

(209 Iowa 400.

strange quirk of statutory construction, the effort of Congress to protect consumers from excessive rates is transformed, where litigation is pending, into an Act which exploits consumers and unjustly enriches distributing companies. This Company has already received a reasonable compensation for its services. It is entitled to no more under Iowa or federal law.

Mr. Justice MURPHY and Mr. Justice RUTLEDGE concur in this dissent.

ableness of such increase, the Commission is authorized to require appropriate guarantees by Sec. 4(a) of the Act. The Commission may require the natural gas companies " . . . to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid" This would appear to be broad enough to protect consumers where the amounts were paid in their behalf. Surely the Act gives no less power to a court.

Mr. Justice DOUGLAS, dissenting.

I think that the claims to the fund in possession of the court below are to be determined by state law. The Federal Power Commission has no authority to determine the rates which petitioner may charge in these Iowa cities. Under the Natural Gas Act that is for Iowa and Iowa alone to determine. *Public Utilities Commission v. United Fuel Gas Co.*, 317 U. S. 456, 467; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610. In that respect this case differs markedly from *United States v. Morgan*, 307 U. S. 183. If there had been no stay order entered and the interstate rate from the Pipeline company to petitioner had been reduced when the Federal Power Commission entered its order, it still would have taken action by the local authorities to reduce the rates in these Iowa cities.

But the federal court which has this fund has considerable discretion in its management. *United States v. Morgan, supra*. I fail to see how it abused its discretion in handing the fund over to the local officials. It is only fair to assume that a reduction in the interstate rate would have been followed by a reduction in local rates.¹ That indeed was the primary objective of the Natural Gas Act. *Federal Power Commission v. Hope Natural Gas Co.*,

¹ The City of Muscatine did in fact reduce the rates after the stay order had been vacated.

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supra. We are pointed to no provision of local law which raises any substantial question concerning the power of the local authorities to make a readjustment of rates through the distribution of funds impounded under a stay order.² And the claim of petitioner that local law would prevent a reduction in its rates for the period while the stay order was in effect is far too vague to acquire the dignity of a substantial question.³ He who maintains that position has the distinct burden of overcoming the presumption that as a matter of local law the consumers were entitled to the benefits of this rate reduction. Petitioner fails to carry that burden. The record is void of any credible evidence that a reduction in the interstate rate would not have warranted a reduction in local rates.

Petitioner is adequately protected by the decree entered by the court below. That court did not undertake finally to determine the rights of the parties in the fund. It has turned the fund over to respondents without prejudice to petitioner's rights in it. Those rights are determinable under Iowa law. That procedure does not preclude petitioner from its day in an Iowa court if its claim to the fund turns out to be less frivolous and more substantial than it appears to be. I think the court below selected the most equitable and just method of rectifying the injury done by its stay order.

² Petitioner asserts, and I assume that under the Iowa law rates can be made only prospectively. But it appears from *Town of Williams v. Iowa Falls Electric Co.*, 185 Ia. 493, 500, that the Iowa courts under their "balance of convenience" rule will impound alleged excessive amounts collected by a utility company pending the outcome of rate litigation so as to protect the rights both of the utility and the consumers. If the rate increase is ultimately disallowed, the impounded funds will be returned to the customers; otherwise they will be turned over to the company. We are pointed to no authority which suggests that Iowa would not sanction the use of such a method of readjustment under the circumstances of this case.

³ So far as appears the rates which petitioner was charging during the period of the stay order had been voluntarily proposed by it.

